91-314

No.

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHAMP CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, LOCAL 509,

Respondents.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

VOLUME 1

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	No. 89-70160
Petitioner,	)	
v.	)	NLRB NOS.
	)	21-CA-18696
CHAMP CORPORATION,	)	21-CA-19007
	)	21-CA-19423
Respondent.	)	21-CA-19424
	)	
	)	**ORDER AND**
	)	**AMENDED**
	)	**OPINION**

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted

June 8, 1990---Pasadena, California

Filed August 29, 1990

Amended May 20, 1991

Before: Arthur L. Alarcon, Melvin Brunetti and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Alarcon

ORDER

The opinion filed August 29, 1990, and reported at 913 F.2d 639 (9th Cir. 1990) is hereby amended as follows:

1. On Slip op., page 9751, second full paragraph, first sentence following the word, "practices," add:

"thereby aggravating or prolonging the strike."

2. Continuing on Slip op., page 9751, same paragraph, second sentence, after the words: "...expanding the issues in this labor dispute," add the following:

"thereby delaying settlement."

3. On Slip op., page 9758, line 7 of the first full paragraph delete the remainder of the paragraph commencing with "Champ has failed to cite..." Insert instead:

"We agree with Champ that the burden is on the General Counsel to prove that the unfair labor practices aggravated or

prolonged the strike. In N.L.R.B. v. Top Manufacturing Co., Inc., 594 F.2d 223 (9th Cir. 1979), we were called upon to determine whether an economic strike had been converted into an unfair labor practice strike. Id. at 225. We began our discussion of the applicable law by stating "the controlling legal principles are not controverted." Id. Unfortunately, we cited no authority for this proposition. Instead we described the "controlling legal principles" in the following words: "A strike begun in support of economic objectives becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices." Id. By using this language to reflect "controlling legal principles," we did not intend to adopt a new rule. To make clear what is implicit in our decision

in Top, we agree with those circuits that have adopted the principle that violations of the National Labor Relations Act which aggravate or prolong an economic strike will convert it to an unfair labor practice strike. See Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1080 (1st Cir. 1981) (finding no conversion where the unfair labor practice did not prolong the strike or result in a delayed settlement); See also C-Line Express, 292 N.L.R.B. No. 63 (1989) (finding no conversion where the unfair labor practice did not cause a prolongation of the work stoppage); Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B., 718 F.2d 269 (8th Cir. 1983) (finding conversion where the unfair labor practice prolonged the strike); Facet Enterprises, Inc., v. N.L.R.B., 907 F.2d 963, 977 (10th Cir. 1990)

(applying the prolong or aggravate test and finding conversion where a strike was expanded to include a protest over unfair labor practices)".

4. On Slip op., page 9758, in the third line from the bottom of the page after the word, "employees" add the following words to that sentence:

"and delayed settlement of the strike".

5. On Slip op., page 9759, delete the entire first full paragraph starting with "Champ asserts..." and ending with "law of this circuit."

The panel as constituted in the above case has voted to deny the petition for rehearing and reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on

the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

OPINION

ALARCON, Circuit Judge:

The National Labor Relations Board (Board) has applied to this court for enforcement of its Decision and Order entered on November 25, 1988. The Board found that Champ Corporation (Champ) committed unfair labor practices by discharging employees while they conducted an economic strike. The Board concluded that these unfair labor practices converted the employees' economic work stoppage into an unfair labor practice strike. As a result, the Board ordered, inter alia, that Champ cease and desist all unfair labor practices and reinstate all striking employees with backpay from the date

of their unconditional offer to return to work.

Champ contends that substantial evidence does not support the Board's finding that any striking employees were fired during the economic strike. Champ also argues that the Board erred as a matter of law in concluding that the alleged discharge of the employees converted an economic work stoppage into an unfair labor practice strike.

The primary issue we must decide is whether Champ's conduct in discharging certain striking employees converted an economic work stoppage into an unfair labor practice strike by expanding the issues in dispute to include a protest regarding the company's alleged unfair labor practices thereby aggravating or prolonging the strike. We conclude that the Board's finding that economic strikers were discharged is supported by substantial evidence and that

this conduct became a contributing factor in expanding the issues in this labor dispute thereby delaying settlement. We discuss each issue and the facts pertinent thereto under separate headings.

I

SUBSTANTIAL EVIDENCE OF UNFAIR LABOR PRACTICES

Champ asserts that the Board's finding that the company was guilty of unfair labor practices because certain employees were discharged on or before October 25, 1979 is not supported by substantial evidence. We disagree.

We must uphold the Board's decision if its factual findings are supported by substantial evidence and if it has correctly applied the law. NLRB v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1989); Lippincott Indus., Inc. v. NLRB, 661 F.2d 112, 114 (9th Cir. 1981). If there is

evidence to support two conflicting views, the Board's findings must be allowed to stand even though we might have reached a different conclusion on our own. NLRB v. Pacific Grinding Wheel Co., 572 F.2d 1343, 1347 (9th Cir. 1978). Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows they are incorrect. Lippincott, 661 F.2d at 114.

A. **The Discharge of Baugh and Naranjo**

[1] Because contract negotiations reached an impasse on economic issues, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America--UAW, Local No. 509 (the Union) ordered a work stoppage on October 15, 1979. Prior to that date, on October 3, 1979, Tom Simovich, Champ's general manager, presented a list to a deputy sheriff containing the names of nine employees. Simovich told the

officer that these employees might cause problems in the event of a strike. Steven Baugh's name was on the list.

On October 17, 1979, Baugh and Jose Naranjo were picketing in front of one of Champ's building. Tom Simovich came out of the building and spoke to Naranjo. He told Naranjo that "he might as well go home" because he "didn't work here anymore." Baugh said "what about me, Tom?" and Simovich replied "[y]ou're fired, too. You might as well go home." Simovich then told Baugh and Naranjo that he would have them arrested if they did not leave. Baugh asked Simovich why he was fired but Simovich did not reply. Baugh then told Simovich, "[w]e still love you, Tom. We just want a contract." Simovich testified that he had had no conversation with Baugh or Naranjo during the first week of the strike. The ALJ found that Simovich's testimony was not credible.

The Board concluded that the testimony of Baugh and Naranjo was sufficient to show that they were discharged in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3) (the Act).[1] The Board stated that "Simovich's remarks were entirely unequivocal in character, were phrased as an immediate discharge, were accompanied by a direction to leave the employment site with a concurrent threat of arrest, and were uttered by a high

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[1]

§ 158. **Unfair labor practices**

a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

29 U.S.C. § 158(a)(1), (3) (1988).

management official so as to lend credence to the finality of the action taken."

Champ contends that there is substantial evidence in the record that supports a finding that Baugh and Naranjo did not believe that they had been discharged. Champ characterizes the conversation among Simovich, Baugh, and Naranjo as a jovial, facetious exchange. As further proof that no discharge occurred, Champ notes that Baugh and Naranjo continued picketing and reported for reinstatement on April 21, 1980, and that Baugh continued serving as a member of the Union's negotiating team. In addition, Champ contends that the letter sent to all striking employees on October 30, 1979 requesting them to return to work demonstrates that Baugh and

Naranjo were not discharged on October 17, 1979.[2]

"No set words are necessary to constitute a discharge; words or conduct, which would logically lead an employee to

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[2] The letter reads as follows:

We have been waiting patiently for you to return to your job and we shall continue to do so until Friday morning, November 2, at 8 a.m.

If you choose to keep your job, drive in the gate where the guards are just south of the company's main office and go to the personnel office--you will be put to work immediately.

There is plenty of work and CHAMP will continue to operate!

If you choose not to return to your job, you may Lose Your Job Entirely! The company is not continuing the health and life insurance of persons not working--if you want to keep your health and life insurance protection for you and your family, you may do so by calling (213) 444-9561 for instructions.

We do hope that you will give very careful consideration to this opportunity and to your future, and return to work now!

believe his tenure had been terminated, are in themselves sufficient." NLRB v. Cement Masons Local No. 555, 225 F.2d 168, 172 (9th Cir. 1955). "The test of whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer." Pennypower Shopping News, Inc. v. NLRB, 726 F.2d 626, 629(10th Cir. 1984) (emphasis in original); accord NLRB v. Downslope Indus., Inc., 676 F.2d 1114, 1118 (6th Cir. 1982); NLRB v. Ridgeway Trucking Co., 622 F.2d 1222, 1224 (5th Cir. 1980) (per curiam); NLRB v. Trumbull Asphalt Co, 327 F.2d 841, 843 (8th Cir. 1964). In Health Enterprises of America, Inc., 273 NLRB, 1196 (1984), the Board held that a top management official could be taken at his word when he told an employee that he was fired. Id. at 1204. In Trident Recycling Corp., 282 NLRB 1255 (1987), the Board stated that it must view

the evidence through the strikers' eyes. Id. at 1260. "Each case requires an examination of the facts." Id.

[2] Simovich's statements that Baugh and Naranjo were "fired" and" might as well go home" would lead reasonable workers to believe they had been discharged. As a high management official, Simovich had the power to discharge employees; the employees were entitled to take Simovich at his word. Health Enters. of Am., Inc., 273 NLRB at 1204. Simovich backed up these statements by threatening to have Baugh and Naranjo arrested if they did not leave. Champ has made no showing that the ALJ's credibility determinations were erroneous. See Lippincott, 661 F.2d at 114 (deference must be given to a ALJ's credibility determinations absent a clear preponderance of the evidence to the contrary).

[3] The fact that Baugh and Naranjo continued picketing and that Champ subsequently reinstated them after the Union agreed to terminate the strike does not alter our conclusion that it was reasonable for them to believe that they were discharged on October 17, 1979. It is not unusual for an employee who has been unlawfully discharged for union activity to continue to picket. In Health Enterprises of America, Inc., 273 NLRB 1196 (1984), the Board concluded that a discharged employee's continued picketing did not alter the fact of his discharge. Id. at 1203-04. The fact that Baugh and Naranjo presented themselves for reinstatement does not demonstrate it was unreasonable for them to believe that on October 17, 1979 they had been discharged. See Pennypower Shopping News, 726 F.2d at 630 (holding that subsequent reinstatement did not alter a finding of discharge where that employer had

created ambiguity as to its employees' status); Central Broadcast Co., 280 NLRB 501, 504 (1986) (holding that a subsequent reinstatement did not alter the fact that a discharge took place).

B. **The Discharge of Valenzuela, Solis, Gutierrez, and Ortiz**

On October 25, 1979, Champ's negotiator, Edmund Hoy, Jr., met with Ralph Gazzigli, the Union's negotiator. Hoy handed Gazzigli a list, prepared by Tom Simovich, containing the names of Steve Baugh, Heriberto Valenzuela, Joe Solis, Ruben Gutierrez, and Eduardo Ortiz. Hoy informed Gazzigli "very adamantly" that the individual on the list "would never be rehired, or reinstated under any conditions." Gazzigli informed Hoy that he could not negotiate away any employee's job and handed the list back to Champ's negotiator. Gazzigli testified that he told Hoy "there was no way I could negotiate, or

agree to single out any persons as far as negotiating the job away...I couldn't do that, I wouldn't do it." Prior to giving back the list, Gazzigli read all of the names on the list.

At a subsequent negotiating session, on October 31, 1979, Hoy again attempted to present the list to Gazzigli. Tom Simovich, Steve Baugh, and a federal mediator were also present. Hoy stated that he wanted to present the list containing the names of individuals who would not be rehired under any circumstances, regardless of whether a contract was formed. Gazzigli again informed Hoy that he would not negotiate anyone's job away. He cautioned Hoy against formally presenting the list. The mediator intervened. The list was never formally presented at the negotiating session. Baugh saw his name on the list when it was placed on the table by Hoy.

The Board concluded that each of the employees named in the list had been discharged by Champ. The Board determined that the employment status of these individuals had been removed by Champ as a negotiable matter, thereby "effectively implementing their discharges." The Board further stated that "Hoy's characterization of the employment tenure of the employees on the list was clear and unambiguous: they would 'never' resume their employment 'under any conditions.'"

Champ argues that the employees on the list were not discharged. First, Champ claims that "there is no credible evidence" that the employees knew their names were on the list. Second, Champ contends that the list was presented as a negotiable matter, not as "a firm and final decision."

As discussed above, the test for determining if Valenzuela, Solis, Gutierrez,

and Ortiz were discharged is whether a reasonable employee would have believed he was terminated by the employer's conduct. NLRB v. Cement Mason Local No. 555, 225 F.2d at 172. An employee must be aware of the employer's actions, otherwise he would have no basis for inferring his employment had been terminated. See Health Enters. of Am., Inc., 273 NLRB 1196, 1204 (1984) (finding no discharge where neither employees nor union was aware that employer had stamped "terminated" on timecards).

The record shows that Gazzigli, the Union negotiator, saw all of the names on the list. Baugh also saw Joe Solis' name on the list. On November 5, 1979, at a Union meeting, Baugh and Gazzigli discussed the no reinstatement list with all the Union members. The evidence shows that the discharge issue dominated all of the discussion at the proceedings at the Union

meeting. Accordingly, substantial evidence exists to demonstrate that the striking employees were aware of Champ's actions. See Martin Arsham Sewing Co., 244 NLRB 918, 918 (1979) (Board held discharge had occurred where union officials were aware of company's conduct and communicated that information to the employees).

[4] We hold that Champ's conduct in showing the list to Union officials and stating unequivocally that the listed employees would never be reinstated regardless of whether a contract was reached, was substantial evidence demonstrating that the named employees reasonably believed they had been discharged. Champ's argument that the list was merely a negotiable matter is belied by the evidence that Hoy "adamantly" stated that the listed individuals would not be reinstated under any conditions, regardless of whether a contract was reached.

II

CONVERSION OF THE STRIKE

[5] Having determined that Champ discharged employees engaged in an economic strike, we must next review the evidence to determine whether this conduct converted the economic work stoppage into an unfair labor practice strike. It is undisputed that the discharge of a striking employee is an unfair labor practice under sections 8(a)(1) and (3) of the Act. See NLRB v. Kaiser Steel Corp., 700 F.2d 575, 576-77 (9th Cir. 1983) (discharge of employees for striking is an unfair labor practice).

[6] Champ contends that "even if one or both of the findings of illegal discharges is upheld, the record is devoid of evidence which supports a finding of the strike being converted." Brief for Respondent at 5-6. Champ also argues that "[t]he burden is on the General Counsel to prove that the unfair

labor practices aggravated or prolonged the strike." Id. at 6. We agree with Champ that the burden is on the General Counsel to prove that the unfair labor practices aggravated or prolonged the strike. In N.L.R.B. v. Top Manufacturing Co., Inc., 594 F.2d 223 (9th Cir. 1979), we were called upon to determine whether an economic strike had been converted into an unfair labor practice strike. Id. at 225. We began our discussion of the applicable law by stating "the controlling legal principles are not controverted." Id. Unfortunately, we cited no authority for this proposition. Instead we described the "controlling legal principles" in the following words: "A strike begun in support of economic objectives becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices." Id. By using this language to reflect "controlling legal

principles," we did not intend to adopt a new rule. To make clear what is implicit in our decision in Top, we agree with those circuits that have adopted the principle that violations of the National Labor Relations Act which aggravate or prolong an economic strike will convert it to an unfair labor practice strike. See Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1080 (1st Cir. 1981) (finding no conversion where the unfair labor practice did not prolong the strike or result in a delayed settlement); See also C-Line Express, 292 N.L.R.B. No. 63 (1989) (finding no conversion where the unfair labor practice did not cause a prolongation of the work stoppage); Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B., 718 F.2d 269 (8th Cir. 1983) (finding conversion where the unfair labor practice prolonged the strike); Facet Enterprises, Inc., v. N.L.R.B., 907 F.2d 963, 977 (10th Cir. 1990) (applying the prolong or

aggravate test and finding conversion where a strike was expanded to include a protest over unfair labor practices).

Champ's notification to the Union's principal negotiator that certain striking employees, including a member of the employees' negotiating committee, would never be rehired or reinstated "under any conditions" expanded the existing economic dispute between the parties to include the employment status of striking employees and delayed settlement of the strike. Champ knew or should have known that this direct challenge to union solidarity and collective action would cause the membership to take action to protest this unfair labor practice. The unanimous vote of the membership on November 5, 1979 to remain on strike until all strikers were reinstated should have been foreseeable to any rational employer.

Champ argues that, in determining whether there is substantial evidence to support a finding that the economic work stoppage became an unfair labor practice strike, we should consider the fact that the picket signs made no reference to the discharge of striking employees. Champ cites NLRB v. Proler International Corp., 635 F.2d 351 (5th Cir. 1981), as authority for this proposition. In Proler the court held that the evidence was insufficient to show that an economic work stoppage was converted to an unfair labor practice strike where the record showed that a company vice-president told employees that if they did not return to work they would lose their jobs. Id. at 353. The Fifth Circuit concluded that "[t]he employees did not consider themselves discharged" or threatened with job termination. Id. at 354. The court also noted that the picket signs did not list the threat of discharge or

discharge as a grievance. Id. In the instant matter, as discussed above, substantial evidence supports a finding that the union membership reasonably inferred that striking employees had been illegally discharged.

In Vulcan Hart, the employer made a similar argument concerning failure to change the picket signs. 718 F.2d at 276. Petitioner asserted that "the Union's strike remained an economic strike after November 1, because the subject matter on the picket signs remained the same, and the strikers affirmed that they would not return until the Union and V-H agreed on a contract." Id. The Court rejected this argument sub silentio and found that there was substantial evidence that the employer engaged in unfair labor practices by withdrawing recognition of the union after the workers went on strike. Id. We conclude, from the authorities cited by

Champ, that the failure to change the wording on the picket signs to show that the employer is guilty of unfair labor practices is a factor that should be considered in reviewing the record as a whole to determine whether an unfair labor practice has converted an economic work stoppage into an unfair labor practice strike. We have considered this factor. We remain persuaded that substantial evidence supports the Board's finding.

Champ also appears to argue that the economic work stoppage was not converted into an unfair labor practice strike as a result of the discharge of the striking employees because "there is no evidence that it became an issue in the negotiations," Brief for Respondent at 10, or that the membership's grievance was communicated to Champ. Id. No authority is cited for the suggestion that a union must inform an employer that his unfair labor practices have converted the work

stoppage into an unfair labor practice strike. The record shows that Champ gratuitously presented the issue of the company's refusal to rehire the discharged employees to the Union's negotiator and informed him that rehiring would not be considered under any circumstances. The impact in the pending negotiations should have been obvious to any reasonable employer. Any union's credibility with its membership would be destroyed if it condoned the discharge of a union member, who was acting as a member of the negotiating committee during an economic strike, without prolonging the strike until this grievance was resolved. No notice was required that prolongation of the strike would naturally flow from the employer's grievous unfair labor practices. Furthermore, the record shows that the Union's negotiator informed Champ's

representative that the Union could not agree to deny reinstatement to any person.

III

ALLEGED BOARD CONSIDERATION OF ALLEGATIONS OUTSIDE THE COMPLAINT

Champ claims that the Board "improperly considered allegations outside the complaint in finding a conversion of the strike to an unfair labor practice strike." Brief for Respondent at 13. The complaint alleged that the discharges described above caused the strike to be converted; it did not allege that Champ's other alleged unfair labor practices converted the economic work stoppage into an unfair labor practice strike. Champ bases its argument on the fact that the ALJ relied in part upon unfair labor practices other that the discharges. Champ contends that the Board failed to modify the ALJ's order and that therefore, "it must be assumed that the Board also relied on the

'other alleged acts'." Brief for Respondent at 15.

[7] The record does not support Champ's contention that the Board considered unfair labor practices not alleged in the complaint. We must determine whether the Board, not the ALJ, properly applied the law. Lippincott, 661 F.2d at 115. Thus, the fact that the ALJ may have improperly relied upon allegations outside the complaint is irrelevant if the Board did not do so. Our examination of the Board's decision reveals that it properly confined its review of the conversion issue to the discharge of the employees. The Board specifically stated "that the termination of each of the six employees served to convert the strike to an unfair labor practice strike." The Board made no mention of any other alleged unfair labor practices when it determined that the strike was converted. In fact, the Board determined that the strike

was converted at the November 5, 1979 Union meeting at which the discharges were discussed. We find that the Board properly confined its review to the allegations raised in the complaint. Therefore, Champ's contention that the Board improperly considered acts not alleged in the complaint is without merit.

IV

ALLEGED SUPPRESSION OF RELEVANT EVIDENCE

Champ argues that it was erroneously foreclosed from producing evidence that would demonstrate that the alleged discharge of the striking employees had no effect on prolonging the strike. The record shows that the ALJ informed Champ's counsel as follows:

> I am not going to preclude you; I can see the relevance if you want to argue that [the strike was not prolonged because of what management did], but I am going to consider the door opened [to

evidence of surface bargaining] in all fairness to you, if you do pursue that area.

In response to the court's explanation of the ruling allowing Champ's counsel to proceed with questions that would attempt to show that management's conduct did not prolong the strike, Champ's counsel stated: "Okay. Based on what you advised me, I am not going to pursue that line of questioning." Thus, contrary to Champ's assertion, the ALJ ruled that the proffered evidence was relevant and admissible.

V

THE STRIKERS' RIGHT TO IMMEDIATE REINSTATEMENT

On April 17, 1980 the Union determined that the strike was ineffective and decided to end the strike and pursue its unfair labor practice claims. On that date the Union sent a telegram to Champ making an unconditional

offer to return to work on April 21. On April 21, approximately 54 of the striking employees showed up at their regular shift to begin work. Champ, however, did not put them to work on that day. The reinstatement of the strikers did not actually begin until May 9, 1980. On that date, Champ gradually began reinstating some of the strikers. Most of the strikers had been reinstated by May 30. The remainder were not reinstated for an extended period of time.

When the striking employees arrived for work on April 21 Champ gave each of them a letter which stated: "Your union has not given us reasonable time to replace you to your job or an equivalent job. We do not have sufficient health and sanitation facilities to accept any major number of employees. For further instruction, please contact your union." Several employees all testified that Ed Simovich told them he did

not have timecards ready for their return. Simovich testified that he had three concerns that caused him to delay reinstatement. First, he was concerned with potential violence between the strikers and nonstrikers given the number of threatening confrontations and vandalism incidents that had occurred during the strike. Second, he wanted to ensure the quality of his product and was concerned about the potential for sabotage of the equipment. Finally, he cited worsening economic conditions and a desire to ensure "continuity in work in the jobs being performed."

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by failing to reinstate the strikers who had not been permanently replaced before the strike was converted into an unfair labor practice strike. The ALJ found that Champ's evidence that it delayed

reinstatement to avoid violence between the strikers and nonstrikers was not credible. Champ did not produce evidence to show that the strikers' immediate reinstatement would have created a safety hazard. The ALJ also concluded that testimony produced by Champ, that it was concerned about quality control and economic conditions, was pretextual and unworthy of consideration. The ALJ's conclusion that the only credible reason that Champ delayed reinstatement was because the strikers "engaged in protected concerted activity" is supported by substantial evidence in the record when viewed in its entirety.

Champ argues that it was justified in delaying reinstatement because of its concern for violence among the workers. The ALJ found Champ substantially added to the hostility by discharging striking employees, failing to take action against nonstrikers

for their misconduct, and "clearly exhibiting anti-union animus." Champ relies on Pacific Powder Co., 84 NLRB 280 (1949), in support of its contention that potential violence justified a delay in reinstatement. In Pacific Powder, the employer attempted to justify its refusal to reinstate striking employees immediately on the basis of hostility between strikers and nonstrikers. This argument was rejected because the employer substantially added to the hostility that existed between the nonstrikers and strikers. Id. at 290-24. Thus, Champ cites no case, nor has our research revealed any relevant authority, in which an employer's refusal to reinstate unfair labor practice strikers immediately was upheld on the basis of worker hostility.

[8] Unfair labor practice strikers are entitled to immediate reinstatement upon making an unconditional offer to return. NLRB v. International Van Lines, 409 U.S. 48,

50-51 (1972); NLRB v. Top Mfg. Co., 594 F.2d 223, 225 (9th Cir. 1979). Although economic strikers may be permanently replaced, an employer must dismiss replacement workers if necessary to make room for the returning unfair labor practice strikers. International Van Lines, 409 U.S. at 50-51; NLRB v. West Coast Casket Co., 205 F.2d 902, 908 (9th Cir. 1953). "When the striking employees ma[ke] an unconditional offer to return to their employment, [the employer] [i]s obligated to make them an unconditional offer of reinstatement." Presto Casting Co. v. NLRB, 708 F.2d 495, 499 (9th Cir.), cert. denied, 464 U.S. 994 (1983).

Substantial evidence justifies the Board's finding that Champ improperly failed to offer immediate reinstatement to the unfair labor practice strikers. Although it is true, as Champ alleges, that the strike was rife with acts of aggression, violence,

and property damage, Champ's behavior significantly contributed to the atmosphere of hostility. The record shows that Champ committed unfair labor practices by discharging economic strikers and failed to take any action against nonstriking employees for their acts of violence against strikers. Champ has failed to demonstrate that it was justified in delaying reinstatement because of a concern for potential employee violence.

VI

DISCHARGE OF PERMANENTLY REPLACED STRIKERS

Prior to November 5, 1979, the date of which the strike became an unfair labor practice strike, Champ had permanently replaced ten of the economic strikers.[3] As noted earlier, Champ was entitled to replace

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[3] The ten strikers are Antonio Andrade, Javier Arroyo, Alejandro Arroyo, David Coronado, Rick Craft, Enrique Figueroa, Lorenzo Franco, Micky Lambright, Martiniano Rodriguez, and Francisco Zamora.

the economic strikers permanently. Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1153 (9th Cir. 1986). On May 30, 1980 Champ called the ten replaced strikers into the personnel office. Champ gave each employee a letter which told the employees that they were on layoff status because no jobs were available. The letter continued, "we will place your name on a preferential hiring list at your request, which must be received by the company, in writing, no later than June 6, 1980." When asked by an employee whether signing the request forms would result in a loss of seniority, Ed Simovich said that he could not answer at that time. None of the employees returned the form.

On June 10, 1980, Champ sent the ten employees another letter, along with their accrued vacation pay. The letter stated:

> As of this date, we have not received your request to place your name

on the company's preferential hiring list. We discussed this matter with you on May 30, 1980, and gave you a preferential hiring form with a stamped and pre-addressed envelope for mailing directly to the company. We desire to know whether or not you desire to be included on the preferential hiring list so that we do not overlook you should we need additional help in the future. If you desire to be included on the preferential hiring list, we must have your request within the next several days or so, unless there is an extenuating circumstance beyond your reasonable control.

Subsequently, after receiving no reply to its letter, Champ mailed another letter to the six employees who had vested interests in the profit sharing plan returning all of their money. When the Union

inquired of Champ as to the status of these employees, Champ stated in a letter that checks were sent as a result of the employer's termination of employment. After the Union notified Champ that, in its view, Champ had discharged the employees, Champ sent a letter on September 5, 1980 requesting a return of the profit sharing checks. All but one employee returned these checks. Under the Act, permanently replaced economic strikers continue to be employees until they obtain substantially equivalent employment; Champ could not simply discharge them because there were no available jobs at the time. NLRB v. Rockwood & Co., 834 F.2d 837, 389 (9th Cir. 1987).

The Board found that Champ's actions effectively discharged the employees in violation of sections 8(a)(1) and (3) of the Act. The Board did not determine what remedy should be granted under the circumstances, in

light of Champ's September 5 letter, leaving that to the compliance stage. Champ argues that it did not discharge the ten employees. Champ contends that the only reason for remitting the profit sharing checks was because the trustee of the profit sharing plan told Champ that only active employees could participate. Thus, Champ alleges that its actions "did not emanate from any intention to terminate...these employees." Brief for Respondent at 36.

Although economic strikers may be permanently replace, they are entitled to reinstatement when and if a job opens up for which the striker is qualified. NLRB v. Fleetwood Trailor Co., 389 U.S. 375, 381 (1967); NLRB v. Rockwood & Co., 834 F.2d 837, 839 (9th Cir. 1987). Once the employee makes an unconditional offer to return to work, the employer must make an unconditional offer of reinstatement, if a job is available. "The

only obligation placed upon the striker is that he unconditionally request reinstatement." NLRB v. McQuaide, Inc., 617 F.2d 349, 354 (3d Cir. 1980). The reinstatement cannot be made conditional on signing a form. Presto Casting Co. v. NLRB, 708 F.2d at 498-99. "The Company ha[s] no right to require the employees to repeat the statement of interest [in returning to work] made by the Union." NLRB v. McQuaide, Inc., 617 F.2d at 354; see also NLRB v. Vitronic Div. of Penn Corp., 630 F.2d 561, 564-65 (8th Cir. 1979) (company could not require affirmative action on employee's part to remain on the reinstatement list; this included filling out a form).

As stated above in Part I, the test for whether a discharge has occurred is whether the words or conduct would lead a reasonable employee to believe that he or she had been discharged. See Cement Masons Local No. 555,

225 F.2d at 172. This test does not depend upon the employer's intentions, but on the reasonable employee's reaction to the employer's action.

[9] Under the facts found credible by the ALJ, substantial evidence supports the Board's finding of a discharge. Champ improperly required the employees to sign forms indicating their desire to be placed on the preferential hiring list. Although Simovich stated that this was not truly a requirement, this information was never conveyed to the employees. Later, after refusing to respond to Champ's letters, the employees received their accumulated vacation pay and profit sharing benefits. Based upon inquiry from the Union, Champ stated that the employees had been terminated. Upon these facts, a reasonable employee could believe he or she had been discharged.

VII

CHAMP'S REFUSAL TO REINSTATE STRIKERS FOR ALLEGED MISCONDUCT

[10] Champ argues that it properl refused to reinstate unfair labor practic strikers, Jose Viallavicencio, Carlo Almoroz, Joe Solis, and Ramon Rodriguez, fo strike-related misconduct.

After the strikers unconditionall offered to return to work, Champ refused t reinstate eleven of the unfair labor practic strikers, including the four mentioned above for alleged strike misconduct. Between May and May 7, 1980 Champ obtained a list o strikers with pending criminal charges fro the police department. The list containe the names of the 11 discharged strikers. O May 30, 1980 Champ requested that the person on the list report to the personnel office Champ gave each employee a letter statin "You currently have pending criminal charge

with the District Attorney's Office for STRIKE-RELATED CRIMINAL VIOLATIONS. You are therefore, ineligible for work reinstatement. Should your arrest(s) be considered false, your reinstatement will be reconsidered at that time." Ed Simovich instructed the strikers that they clear up their records before they could be reinstated. At this time, Champ made no mention of any strike-related misconduct other than that which resulted in criminal charges. In fact, Champ failed to mention any other misconduct until the hearing before the ALJ.

On June 6, 1980, Champ sent another letter to the group indicating that they were on indefinite suspension status. The letter stated "[w]e are looking deeply into your pending criminal charges which resulted from your arrest(s) for strike-related violence." On October 31, 1980 Champ sent a final letter to Villavicencio, Almoroz, and Rodriguez

stating that they had been terminated fo "strike-related criminal violence." Th letter made no mention of any misconduc other than the pending criminal charges.

Based upon these facts, the AL concluded that Champ improperly refused t reinstate the strikers. The ALJ provide several reasons for this holding. The AL found that the only reason provided by Cham up until the time of the hearing for refusin to reinstate the employees was that crimina charges were pending against them. Champ ha not relied upon any of the other alleged act of misconduct. The ALJ concluded tha Champ's delay in bringing up conduc unrelated to the pending criminal charge demonstrated Champ's lack of good faith i discharging the strikers. In addition, th ALJ found that Champ condoned the misconduc and engaged in discriminatory practices b failing to take action against nonstrikin

employees for their misconduct, and by offering to reinstate the strikers on October 30, thereby condoning all acts prior to that date. Finally, the ALJ credited the strikers' testimony that they did not engage in serious misconduct after October 30, 1979, and also determined that the strikers did not commit the acts of misconduct that resulted in arrests. The ALJ expressly found that the testimony of Champ's witnesses was not credible. The ALJ also determined that Champ displayed anti-union animus in its actions.

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by refusing to reinstate the strikers. The Board found that the only grounds for denying reinstatement were the pending criminal charges. The Board noted that Champ failed to mention any other reason for denying reinstatement until the hearing before the ALJ. The Board also found that

none of the employees were guilty of the misconduct described in the criminal charges.

"Striking employees who engage in serious picket line misconduct forfeit the protection of the Act and may be discharged for such conduct." General Teamsters Local No. 162 v. NLRB, 782 F.2d 839, 841 (9th Cir. 1986). Once the General Counsel has made a prima facia showing of violation of the Act by demonstrating that an employee was discharged for conduct occurring during a strike, "[t]he employer may defend the discharge on the ground that it had 'an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature' and that the discharge decision was based on that misconduct." Id. (quoting General Tel. Co. of Mich. 251 NLRB 737, 738 (1980) (emphasis added), enforced, 672 F.2d 894 (D.C. Cir. 1981)). Once an employer makes this showing, "the General Counsel must

then affirmatively show that the employee did not in fact engage in such conduct." General Teamster, 782 F.2d at 841-42; accord General Tel. Co. of Mich., 251 NLRB at 738-39. If it is found that the employee did not engage in the conduct, he cannot be discharged regardless of the employer's good faith belief. NLRB v. Burnup and Sims, Inc., 379 U.S. 21, 23 (1964).

Substantial evidence support the Board's determination that Champ did not act in good faith in refusing to reinstate the strikers. The fact that Champ never mentioned any misconduct other than the pending criminal charges up until the time of the hearing supports the Board's finding that Champ only relied on the pending criminal charges when it discharged the strikers. The Board's decision is also supported by the fact that Champ only refused to reinstate employees

with pending criminal charges, and did not look into misconduct by any other employee.

Substantial evidence supports the Board's decision that none of the conduct underlying the pending criminal charges in fact occurred. The ALJ credited the testimony of Villavicencio, Almaroz, Solis, and Rodriguez that they did not engage in the misconduct that resulted in criminal charges. The ALJ did not believe the testimony of Champ's witnesses concerning these incidents. All of the criminal charges were dropped with the exception of those against Villavicencio, who pleaded nolo contendere to blocking a vehicular crossing. Champ has not shown by a clear preponderance of the evidence that the ALJ's credibility determinations should be rejected. Lippincott Indus., Inc., 661 F.2d at 114. Because the General Counsel has demonstrated that the misconduct in question did not in fact occur, Champ's refusal to

reinstate these employees constitutes an unfair labor practice. See Burnup & Sims, 379 U.S. at 23 (an employer may not discharge an employee for misconduct that did not occur even if the employer had a good faith belief that such misconduct occurred). Because we conclude that the discharge of the employees was based on the existence of criminal charges that were not proved, we need not address the Union's argument that Champ condoned the strikers' misconduct or subjected them to disparate treatment.

VIII

CONCLUSION

The Board's order is supported by substantial evidence and we therefore grant enforcement.

ENFORCEMENT GRANTED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	No. 89-70160
Petitioner,	NLRB Nos. 21-CA-18696 21-CA-19007 21-CA-19423 21-CA-19424
v.	
CHAMP CORPORATION,	OPINION
Respondent.	

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted

June 8, 1990-Pasadena, California

Filed August 29, 1990

Before: Arthur L. Alarcon, Melvin Brunetti and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Alarcon

OPINION

ALARCON, Circuit Judge:

The National Labor Relations Board (Board) has applied to this court for enforcement of its Decision and Order entered on November 25, 1988. The Board found that Champ Corporation (Champ) committed unfair labor practices by discharging employees while they conducted an economic strike. The Board concluded that these unfair labor practices converted the employees' economic work stoppage into an unfair labor practice strike. As a result, the Board ordered, inter alia, that Champ cease and desist all unfair labor practices and reinstate all striking employees with backpay from the date of their unconditional offer to return to work.

Champ contends that substantial evidence does not support the Board's finding that any striking employees were fired during the economic strike. Champ also argues that the Board erred as a matter of law in

concluding that the alleged discharge of the employees converted an economic work stoppage into an unfair labor practice strike.

The primary issue we must decide is whether Champ's conduct in discharging certain striking employees converted an economic work stoppage into an unfair labor practice strike by expanding the issues in dispute to include a protest regarding the company's alleged unfair labor practices. We conclude that the Board's finding that economic strikers were discharged is supported by substantial evidence and that this conduct became a contributing factor in expanding the issues in this labor dispute. We discuss each issue and the facts pertinent thereto under separate headings.

I

SUBSTANTIAL EVIDENCE OF UNFAIR LABOR PRACTICES

Champ asserts that the Board's finding that the company was guilty of unfair labor practices because certain employees were discharged on or before October 25, 1979 is not supported by substantial evidence. We disagree.

We must uphold the Board's decision if its factual findings are supported by substantial evidence and if it has correctly applied the law. N.L.R.B. v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1989); Lippincott Indus., Inc. v. N.L.R.B., 661 F.2d 112, 114 (9th Cir. 1981). If there is evidence to support two conflicting views, the Board's findings must be allowed to stand even though we might have reached a different conclusion on our own. N.L.R.B. v. Pacific Grinding Wheel Co., 572 F.2d 1343, 1347 (9th

Cir. 1978). Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows they are incorrect. Lippincott, 661 F.2d at 114.

A. The Discharge of Baugh and Naranjo

Because contract negotiations reached an impasse on economic issues, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America - UAW, No. 509 (the Union) ordered a work stoppage on October 15,1979. Prior to that date, on October 3, 1979, Tom Simovich, Champ's general manager, presented a list to a deputy sheriff containing the names of nine employees. Simovich told the officer that these employees might cause problems in the event of a strike. Steven Baugh's name was on the list.

On October 17,1979, Baugh and Jose Naranjo were picketing in front of one of

Champ's buildings. Tom Simovich came out of the building and spoke to Naranjo. He told Naranjo that "he might as well go home" because he "didn't work here anymore." Baugh said "what about me, Tom?" and Simovich replied "[y]ou're fired, too. You might as well go home." Simovich then told Baugh and Naranjo that he would have them arrested if they did not leave. Baugh asked Simovichwhy he was fired but Simovich did not reply. Baugh then told Simovich, "[w]e still love you, Tom. We just want a contract." Simovich testified that he had had no conversation with Baugh or Naranjo during the first week of the strike. The ALJ found that Simovich's testimony was not credible.

The Board concluded that the testimony of Baugh and Naranjo was sufficient to show that they were discharged in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §

158(a)(1), (3) (the Act).[4] The Board stated that "Simovich's remarks were entirely unequivocal in character, were phrased as an immediate discharge, were accompanied by a direction to leave the employment site with a concurrent threat of arrest, and were uttered by a high management official so as to lend credence to the finality of the action taken."

Champ contends that there is substantial evidence in the record that supports a finding that Baugh and Naranjo did

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[4] § 158. Unfair labor practices
a) It shall be an unfair labor practice for an employer
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(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . 29 U.S.C. § 158(a)(1),(3)(1988).

not believe that they had been discharged. Champ characterizes the conversation among Simovich, Baugh, and Naranjo as a jovial, facetious exchange. As further proof that no discharge occurred, Champ notes that Baugh and Naranjo continued picketing and reported for reinstatement on April 21, 1980, and that Baugh continued serving as a member of the Union's negotiating team. In addition, Champ contends that the letter sent to all striking employees on October 30,1979 requesting them to return to work demonstrates that Baugh and Naranjo were not discharged on October 17, 1979.[5]

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[5] The letter reads as follows:

We have been waiting patiently for you to return to your job and we shall continue to do so until Friday morning, November 2, at 8 a.m.

If you choose to keep your job, drive in the gate where the
guards are just south of the company's main office and go to the
personnel office - you will be put to work immediately.

(continued...)

"No set words are necessary to constitute a discharge; words or conduct, which would logically lead an employee to believe his tenure had been terminated, are in themselves sufficient." N.L.R.B. v. Cement Masons Local No. 555, 225 F.2d 168, 172 (9th Cir. 1955). "The test of whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer." Pennypower Shopping News, Inc. v.

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[5](...continued)

There is plenty of work and CHAMP will continue to operate!

If you choose not to return to your job, you may Lose Your Job Entirely! The company is not continuing the health and life insurance of persons not working - if you want to keep your health and life insurance protection for you and your family, you may do so by calling (213) 444-9561 for instructions.

We do hope that you will give very careful consideration to this opportunity and to your future, and return to work now!

N.L.R.B., 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in original); accord N.L.R.B. v. Downslope Indus., Inc., 676 F.2d 1114, 1118 (6th Cir. 1982); N.L.R.B. v. Ridgeway Trucking Co., 622 F.2d 1222, 1224 (5th Cir. 1980) (per curiam); N.L.R.B. v. Trumbull Asphalt Co., 327 F.2d 841, 843 (8th Cir. 1964). In Health Enterprises of America, Inc., 273 NLRB, 1196 (1984), the Board held that a top management official could be taken at his word when he told an employee that he was fired. Id. at 1204. In Trident Recycling Corp., 282 NLRB 1255 (1987), the Board stated that it must view the evidence through the strikers' eyes. Id. at 1260. "Each case requires an examination of the facts." Id.

Simovich's statements that Baugh and Naranjo were "fired" and "might as well go home" would lead reasonable workers to believe they had been discharged. As a high management official, Simovich had the power

to discharge employees; the employees were entitled to take Simovich at his word. Health Enters. of Am., Inc., 273 NLRB at 1204. Simovich backed up these statements by threatening to have Baugh and Naranjo arrested if they did not leave. Champ has made no showing that the ALJ's credibility determinations were erroneous. See Lippincott, 661 F.2d at 114 (deference must be given to a ALJ's credibility determinations absent a clear preponderance of the evidence to the contrary).

The fact that Baugh and Naranjo continued picketing and that Champ subsequently reinstated them after the Union agreed to terminate the strike does not alter our conclusion that it was reasonable for them to believe that they were discharged on October 17,1979. It is not unusual for an employee who has been unlawfully discharged for union activity to continue to picket. In

Health Enterprises of America, Inc., 273 NLRB 1196 (1984), the Board concluded that a discharged employee's continued picketing did not alter the fact of his discharge. Id. at 1203-04. The fact that Baugh and Naranjo presented themselves for reinstatement does not demonstrate it was unreasonable for them to believe that on October 17,1979 they had been discharged. See Pennypower Shopping News, 726 F.2d at 630 (holding that subsequent reinstatement did not alter a finding of discharge where that employer had created ambiguity as to its employees' status); Central Broadcast Co., 280 NLRB 501, 504 (1986) (holding that a subsequent reinstatement did not alter the fact that a discharge took place).

B. The Discharge of Valenzuela, Solis, Gutierrez and Ortiz

On October 25, 1979, Champ's negotiator, Edmund Hoy, Jr., met with Ralph

Gazzigli, the Union's negotiator. Hoy handed Gazzigli a list, prepared by Tom Simovich, containing the names of Steve Baugh, Heriberto Valenzuela, Joe Solis, Ruben Gutierrez, and Eduardo Ortiz. Hoy informed Gazzigli "very adamantly" that the individuals on the list "would never be rehired, or reinstated under any conditions." Gazzigli informed Hoy that he could not negotiate away any employee's job and handed the list back to Champ's negotiator. Gazzigli testified that he told Hoy "there was no way I could negotiate, or agree to single out any persons as far as negotiating the job away . . . I couldn't do that, I wouldn't do it." Prior to giving back the list, Gazzigli read all of the names on the list.

At a subsequent negotiating session, on October 31, 1979, Hoy again attempted to present the list to Gazzigli.

Tom Simovich, Steve Baugh, and a federal mediator were also present. Hoy stated that he wanted to present the list containing the names of individuals who would not be rehired under any circumstances, regardless of whether a contract was formed. Gazzigli again informed Hoy that he would not negotiate anyone's job away. He cautioned Hoy against formally presenting the list. The mediator intervened. The list was never formally presented at the negotiating session. Baugh saw his name on the list when it was placed on the table by Hoy.

The Board concluded that each of the employees named in the list had been discharged by Champ. The Board determined that the employment status of these individuals had been removed by Champ as a negotiable matter, thereby "effectively implementing their discharges." The Board further stated that "Hoy's characterization

of the employment tenure of the employees on the list was clear and unambiguous: they would 'never' resume their employment 'under any conditions.'"

Champ argues that the employees on the list were not discharged. First, Champ claims that "there is no credible evidence" that the employees knew their names were on the list. Second, Champ contends that the list was presented as a negotiable matter, not as "a firm and final decision."

As discussed above, the test for determining if Valenzuela, Solis, Gutierrez, and Ortiz were discharged is whether a reasonable employee would have believed he was terminated by the employer's conduct. NLRB v. Cement Masons Local No. 555, 225 F.2d at 172. An employee must be aware of the employer's actions, otherwise he would have no basis for inferring his employment had been terminated. See Health Enters. of Am.

Inc., 273 NLRB 1196, 1204 (1984) (finding no discharge where neither employees nor union was aware that employer had stamped "terminated" on timecards).

The record shows that Gazzigli, the Union negotiator, saw all of the names on the list. Baugh also saw Joe Solis' name on the list. On November 5, 1979, at a Union meeting, Baugh and Gazzigli discussed the no reinstatement list with all the Union members. The evidence shows that the discharge issue dominated all of the discussion at the proceedings at the Union meeting. Accordingly, substantial evidence exists to demonstrate that the striking employees were aware of Champ's actions. See Martin Arsham Sewing Co., 244 NLRB 918, 918 (1979) (Board held discharge had occurred where union officials were aware of company's conduct and communicated that information to the employees).

We hold that Champ's conduct in showing the list to Union officials and stating unequivocally that the listed employees would never be reinstated regardless of whether a contract was reached, was substantial evidence demonstrating that the named employees reasonably believed they had been discharged. Champ's argument that the list was merely a negotiable matter is belied by the evidence that Hoy "adamantly" stated that the listed individuals would not be reinstated under any conditions, regardless of whether a contract was reached.

II

CONVERSION OF THE STRIKE

Having determined that Champ discharged employees engaged in an economic strike, we must next review the evidence to determine whether this conduct converted the economic work stoppage into an unfair labor practice strike. It is undisputed that the

discharge of a striking employee is an unfair labor practice under sections 8(a)(1) and (3) of the Act. See N.L.R.B. v. Kaiser Steel Corp., 700 F.2d 575, 576-77 (9th Cir. 1983) (discharge of employees for striking is an unfair labor practice).

Champ contends that "even if one or both of the findings of illegal discharges is upheld, the record is devoid of evidence which supports a finding of the strike being converted." Brief for Respondent at 5-6. Champ also argues that "[t]he burden is on the General Counsel to prove that the unfair labor practices aggravated or prolonged the strike." Id. at 6. Champ has failed to cite or discuss any cases from this circuit for this proposition. As a panel of this court, we are required to follow the law of this circuit concerning the test to be applied to determine whether an economic work stoppage was converted into an unfair labor practice

strike. See Taylor v. Burlington Northern R.R. Co., 787 F.2d 1309, 1313 (9th Cir. 1986) (a three-judge panel must follow Ninth Circuit precedent). In N.L.R.B. v. Top Manufacturing Company, Inc., 594 F.2d 223(9th Cir. 1979), we explained the applicable rule in the following words: "A strike begun in support of economic objectives becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices." Id. at 225; see also Facet Enter., Inc. v. N.L.R.B., No. 88-2268, slip op. at 27 (10th Cir. July 3, 1990) (finding conversion where a strike was expanded to include a protest over unfair labor practices).

Champ's notification to the Union's principal negotiator that certain striking employees, including a member of the employees' negotiating committee, would never be rehired or reinstated "under any

conditions" expanded the existing economic dispute between the parties to include the employment status of striking employees. Champ knew or should have known that this direct challenge to union solidarity and collective action would cause the membership to take action to protest this unfair labor practice. The unanimous vote of the membership on November 5,1979 to remain on strike until all strikers were reinstated should have been foreseeable to any rational employer.

Champ asserts that the test that should be applied in determining whether a conversion occurred is that expressed in Vulcan Hart Corp. v. N.L.R.B., 718 F.2d 269 (8th Cir. 1983). In Vulcan Hart, the Eighth Circuit stated: "In order for an economic strike to be converted to an unfair labor practices strike, the employer's unfair labor practices must aggravate or prolong the

strike." Id. at 276. To the extent that the Eighth Circuit's rule differs from our expansion of the dispute test set forth in Top Manufacturing, 594 F.2d at 225, we must adhere to the law of this circuit.

Champ argues that, in determining whether there is substantial evidence to support a finding that the economic work stoppage became an unfair labor practice strike, we should consider the fact that the picket signs made no reference to the discharge of striking employees. Champ cites N.L.R.B. v. Proler International Corp., 635 F.2d 351 (5th Cir. 1981), as authority for this proposition. In Proler the court held that the evidence was insufficient to show that an economic work stoppage was converted to an unfair labor practice strike where the record showed that a company vice-president told employees that if they did not return to work they would lose their jobs. Id. at 353.

The Fifth Circuit concluded that "[t]he employees did not consider themselves discharged" or threatened with job termination. Id. at 354. The court also noted that the picket signs did not list the threat of discharge or discharge as a grievance. Id. In the instant matter, as discussed above, substantial evidence supports a finding that the union membership reasonably inferred that striking employees had been illegally discharged.

In Vulcan Hart, the employer made a similar argument concerning failure to change the picket signs. 718 F.2d at 276. Petitioner asserted that "the Union's strike remained an economic strike after November 1, because the subject matter on the picket signs remained the same, and the strikers affirmed that they would not return until the Union and V-H agreed on a contract." Id. The Court rejected this argument sub silentio

and found that there was substantial evidence that the employer engaged in unfair labor practices by withdrawing recognition of the union after the workers went on strike. Id. We conclude, from the authorities cited by Champ, that the failure to change the wording on the picket signs to show that the employer is guilty of unfair labor practices is a factor that should be considered in reviewing the record as a whole to determine whether an unfair labor practice has converted an economic work stoppage into an unfair labor practice strike. We have considered this factor. We remain persuaded that substantial evidence supports the Board's finding.

Champ also appears to argue that the economic work stoppage was not converted into an unfair labor practice strike as a result of the discharge of the striking employees because "there is no evidence that it became an issue in the negotiations,"

Brief for Respondent at 10, or that the membership's grievance was communicated to Champ. Id. No authority is cited for the suggestion that a union must inform an employer that his unfair labor practices have converted the work stoppage into an unfair labor practice strike. The record shows that Champ gratuitously presented the issue of the company's refusal to rehire the discharged employees to the Union's negotiator and informed him that rehiring would not be considered under any circumstances. The impact in the pending negotiations should have been obvious to any reasonable employer. Any union's credibility with its membership would be destroyed if it condoned the discharge of a union member, who was acting as a member of the negotiating committee during an economic strike, without prolonging the strike until this grievance was resolved. No notice was required that prolongation of

the strike would naturally flow from the employer's grievous unfair labor practices. Furthermore, the record shows that the Union's negotiator informed Champ's representative that the Union could not agree to deny reinstatement to any person.

III

ALLEGED BOARD CONSIDERATION OF ALLEGATIONS OUTSIDE THE COMPLAINT

Champ claims that the Board "improperly considered allegations outside the complaint in finding a conversion of the strike to an unfair labor practice strike." Brief for Respondent at 13. The complaint alleged that the discharges described above caused the strike to be converted; it did not allege that Champ's other alleged unfair labor practices converted the economic work stoppage into an unfair labor practice strike. Champ bases its argument on the fact that the ALJ relied in part upon unfair labor

practices other than the discharges. Champ contends that the Board failed to modify the ALJ's order and that, therefore, "it must be assumed that the Board also relied on the 'other alleged acts'." Brief for Respondent at 15.

The record does not support Champ's contention that the Board considered unfair labor practices not alleged in the complaint. We must determine whether the Board, not the ALJ, properly applied the law. Lippincott, 661 F.2d at 115. Thus, the fact that the ALJ may have improperly relied upon allegations outside the complaint is irrelevant if the Board did not do so. Our examination of the Board's decision reveals that it properly confined its review of the conversion issue to the discharge of the employees. The Board specifically stated "that the termination of each of the six employees served to convert the strike to an unfair labor practice

strike." The Board made no mention of any other alleged unfair labor practices when it determined that the strike was converted. In fact, the Board determined that the strike was converted at the November 5, 1979 Union meeting at which the discharges were discussed. We find that the Board properly confined its review to the allegations raised in the complaint. Therefore, Champ's contention that the Board improperly considered acts not alleged in the complaint is without merit.

IV

ALLEGED SUPPRESSION OF RELEVANT EVIDENCE

Champ argues that it was erroneously foreclosed from producing evidence that would demonstrate that the alleged discharge of the striking employees had no effect on prolonging the strike. The record shows that the ALJ informed Champ's counsel as follows:

> I am not going to preclude you; I can see the relevance if you want to argue that [the strike was not prolonged because of what management did], but I am going to consider the door opened [to evidence of surface bargaining] in all fairness to you, if you do pursue that area.

In response to the court's explanation of the ruling allowing Champ's counsel to proceed with questions that would attempt to show that management's conduct did not prolong the strike, Champ's counsel stated: "Okay. Based on what you advised me, I am not going to pursue that line of questioning." Thus, contrary to Champ's assertion, the ALJ ruled that the proffered evidence was relevant and admissible.

V

THE STRIKERS' RIGHT TO IMMEDIATE REINSTATEMENT

On April 17,1980 the Union determined that the strike was ineffective and decided to end the strike and pursue its unfair labor practice claims. On that date the Union sent a telegram to Champ making an unconditional offer to return to work on April 21. On April 21, approximately 54 of the striking employees showed up at their regular shift to begin work. Champ, however, did not put them to work on that day. The reinstatement of the strikers did not actually begin until May 9, 1980. On that date, Champ gradually began reinstating some of the strikers. Most of the strikers had been reinstated by May 30. The remainder were not reinstated for an extended period of time.

When the striking employees arrived for work on April 21 Champ gave each of them a letter which stated: "Your union has not given us reasonable time to replace you to your job or an equivalent job. We do not have sufficient health and sanitation facilities to accept any major number of employees. For further instruction, please contact your union." Several employees also testified that Ed Simovich told them he did not have timecards ready for their return. Simovich testified that he had three concerns that caused him to delay reinstatement. First, he was concerned with potential violence between the strikers and nonstrikers given the number of threatening confrontations and vandalism incidents that had occurred during the strike. Second, he wanted to ensure the quality of his product and was concerned about the potential for sabotage of the equipment. Finally, he cited

worsening economic conditions and a desire to ensure "continuity in work in the jobs being performed."

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by failing to reinstate the strikers who had not been permanently replaced before the strike was converted into an unfair labor practice strike. The ALJ found that Champ's evidence that it delayed reinstatement to avoid violence between the strikers and nonstrikers was not credible. Champ did not produce evidence to show that the strikers' immediate reinstatement would have created a safety hazard. The ALJ also concluded that testimony produced by Champ, that it was concerned about quality control and economic conditions, was pretextual and unworthy of consideration. The ALJ's conclusion that the only credible reason that Champ delayed

reinstatement was because the strikers "engaged in protected concerted activity" is supported by substantial evidence in the record when viewed in its entirety.

Champ argues that it was justified in delaying reinstatement because of its concern for violence among the workers. The ALJ found Champ substantially added to the hostility by discharging striking employees, failing to take action against nonstrikers for their misconduct, and "clearly exhibiting antiunion animus." Champ relies on Pacific Powder Co., 84 NLRB 280 (1949), in support of its contention that potential violence justified a delay in reinstatement. In Pacific Powder, the employer attempted to justify its refusal to reinstate striking employees immediately on the basis of hostility between strikers and nonstrikers. This argument was rejected because the employer substantially added to the hostility

that existed between the nonstrikers and strikers. Id. at 290-24. Thus, Champ cites no case, nor has our research revealed any relevant authority, in which an employer's refusal to reinstate unfair labor practice strikers immediately was upheld on the basis of worker hostility.

Unfair labor practice strikers are entitled to immediate reinstatement upon making an unconditional offer to return. N.L.R.B. v. International Van Lines, 409 U.S. 48, 50-51 (1972); N.L.R.B. v. Top Mfg. Co., 594 F.2d 223, 225 (9th Cir. 1979). Although economic strikers may be permanently replaced, an employer must dismiss replacement workers if necessary to make room for the returning unfair labor practice strikers. International Van Lines, 409 U.S. at 50-51; N.L.R.B. v. West Coast Casket Co., 205 F.2d 902, 908 (9th Cir. 1953). "When the striking employees ma[ke) an unconditional

offer to return to their employment, [the employer] [i]s obligated to make them an unconditional offer of reinstatement." Presto Casting Co. v. N.L.R.B., 708 F.2d 495, 499 (9th Cir.), cert. denied, 464 U.S. 994 (1983).

Substantial evidence justifies the Board's finding that Champ improperly failed to offer immediate reinstatement to the unfair labor practice strikers. Although it is true, as Champ alleges, that the strike was rife with acts of aggression, violence, and property damage, Champ's behavior significantly contributed to the atmosphere of hostility. The record shows that Champ committed unfair labor practices by discharging economic strikers and failed to take any action against nonstriking employees for their acts of violence against strikers. Champ has failed to demonstrate that it was

justified in delaying reinstatement because of a concern for potential employee violence.

VI

DISCHARGE OF PERMANENTLY REPLACED STRIKERS

Prior to November 5, 1979, the date on which the strike became an unfair labor practice strike, Champ had permanently replaced ten of the economic strikers.[6] As noted earlier, Champ was entitled to replace the economic strikers permanently. Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1153 (9th Cir. 1986). On May 30, 1980 Champ called the ten replaced strikers into the personnel office. Champ gave each employee a letter which told the employees that they were on layoff status because no jobs were

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[6] The ten strikers are Antonio Andrade, Javier Arroyo, Alejandro Arroyo, David Coronado, Rick Craft, Enrique Figueroa, Lorenzo Franco, Micky Lambright, Martiniano Rodriguez, and Francisco Zamora.

available. The letter continued, "we will place your name on a preferential hiring list at your request, which must be received by the company, in writing, no later than June 6, 1980." When asked by an employee whether signing the request forms would result in a loss of seniority, Ed Simovich said that he could not answer at that time. None of the employees returned the form.

On June 10, 1980, Champ sent the ten employees another letter, along with their accrued vacation pay. The letter stated:

> As of this date, we have not received your request to place your name on the company's preferential hiring list. We discussed this matter with you on May 30, 1980, and gave you a preferential hiring form with a stamped and pre-addressed envelope for mailing

directly to the company. We desire to know whether or not you desire to be included on the preferential hiring list so that we do not overlook you should we need additional help in the future. If you desire to be included on the preferential hiring list, we must have your request within the next several days or so, unless there is an extenuating circumstance beyond your reasonable-control.

Subsequently, after receiving no reply to its letter, Champ mailed another letter to the six employees who had vested interests in the profit sharing plan returning all of their money. When the Union inquired of Champ as to the status of these employees, Champ stated in a letter that checks were sent as a result of the employer's termination of employment. After

the Union notified Champ that, in its view, Champ had discharged the employees, Champ sent a letter on September 5, 1980 requesting a return of the profit sharing checks. All but one employee returned these checks. Under the Act, permanently replaced economic strikers continue to be employees until they obtain substantially equivalent employment; Champ could not simply discharge them because there were no available jobs at the time. N.L.R.B. v. Rockwood & Co., 834 F.2d 837, 389 (9th Cir. 1987).

The Board found that Champ's actions effectively discharged the employees in violation of sections 8(a)(1) and (3) of the Act. The Board did not determine what remedy should be granted under the circumstances, in light of Champ's September 5 letter, leaving that to the compliance stage. Champ argues that it did not discharge the ten employees. Champ contends

that the only reason for remitting the profit sharing checks was because the trustee of the profit sharing plan told Champ that only active employees could participate. Thus, Champ alleges that its actions "did not emanate from any intention to terminate ... these employees." Brief for Respondent at 36.

Although economic strikers may be permanently replaced, they are entitled to reinstatement when and if a job opens up for which the striker is qualified. N.L.R.B. v. Fleetwood Trailor Co., 389 U.S. 375, 381 (1967); N.L.R.B. v. Rockwood & Co., 834 F.2d 837, 839 (9th Cir. 1987). Once the employee makes an unconditional offer to return to work, the employer must make an unconditional offer of reinstatement, if a job is available. "The only obligation placed upon the striker is that he unconditionally request reinstatement." N.L.R.B. v.

McQuaide, Inc., 617 F.2d 349, 354 (3d Cir. 1980). The reinstatement cannot be made conditional on signing a form. Presto Casting Co. v. N.L.R.B., 708 F.2d at 498-99. "The Company ha[s] no right to require the employees to repeat the statement of interest [in returning to work] made by the Union." N.L.R.B. v. McQuaide, Inc., 617 F.2d at 354; see also N.L.R.B. v. Vitronic Div. of Penn Corp., 630 F.2d 561, 564-65 (8th Cir. 1979) (company could not require affirmative action on employee's part to remain on the reinstatement list; this included filling out a form).

As stated above in Part I, the test for whether a discharge has occurred is whether the words or conduct would lead a reasonable employee to believe that he or she had been discharged. See Cement Masons Local No. 555, 225 F.2d at 172. This test does not depend upon the employer's intentions, but on

the reasonable employee's reaction to the employer's action.

Under the facts found credible by the ALJ, substantial evidence supports the Board's finding of a discharge. Champ improperly required the employees to sign forms indicating their desire to be placed on the preferential hiring list. Although Simovich stated that this was not truly a requirement, this information was never conveyed to the employees. Later, after refusing to respond to Champ's letters, the employees received their accumulated vacation pay and profit sharing benefits. Based upon inquiry from the Union, champ stated that the employees had been terminated. Upon these facts, a reasonable employee could believe he or she had been discharged.

CHAMP'S REFUSAL TO REINSTATE STRIKERS FOR ALLEGED MISCONDUCT

Champ argues that it properly refused to reinstate unfair labor practice strikers, Jose Villavicencio, Carlos Almoroz, Joe Solis, and Ramon Rodriguez, for strike-related misconduct.

After the strikers unconditionally offered to return to work, Champ refused to reinstate eleven of the unfair labor practice strikers, including the four mentioned above, for alleged strike misconduct. Between May 5 and May 7, 1980 Champ obtained a list of strikers with pending criminal charges from the police department. The list contained the names of the 11 discharged strikers. On May 30, 1980 Champ requested that the persons on the list report to the personnel office. Champ gave each employee a letter stating "You currently have pending criminal charges with the District Attorney's Office for

STRIKE-RELATED CRIMINAL VIOLATIONS. You are therefore, ineligible for work reinstatement. Should your arrest(s) be considered false, your reinstatement will be reconsidered at that time." Ed Simovich instructed the strikers that they clear up their records before they could be reinstated. At this time, Champ made no mention of any strike-related misconduct other than that which resulted in criminal charges. In fact, Champ failed to mention any other misconduct until the hearing before the ALJ.

On June 6, 1980, Champ sent another letter to the group indicating that they were on indefinite suspension status. The letter stated [w]e are looking deeply into your pending criminal charges which resulted from your arrest(s) for strike-related violence." On October 31, 1980 Champ sent a final letter to Villavicencio, Almoroz, and Rodriguez stating that they had been terminated for

"strike-related criminal violence." The letter made no mention of any misconduct other than the pending criminal charges.

Based upon these facts, the ALJ concluded that Champ improperly refused to reinstate the strikers. The ALJ provided several reasons for this holding. The ALJ found that the only reason provided by Champ up until the time of the hearing for refusing to reinstate the employees was that criminal charges were pending against them. Champ had not relied upon any of the other alleged acts of misconduct: The ALJ concluded that Champ's delay in bringing up conduct unrelated to the pending criminal charges demonstrated Champ's lack of good faith in discharging the strikers. In addition, the ALJ found that Champ condoned the misconduct and engaged in discriminatory practices by failing to take action against nonstriking employees for their misconduct, and by

offering to reinstate the strikers on October 30, thereby condoning all acts prior to that date. Finally, the ALJ credited the strikers' testimony that they did not engage in serious misconduct after October 30, 1979, and also determined that the strikers did not commit the acts of misconduct that resulted in arrests. The ALJ expressly found that the testimony of Champ's witnesses was not credible. The ALJ also determined that Champ displayed anti-union animus in its actions.

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by refusing to reinstate the strikers. The Board found that the only grounds for denying reinstatement were the pending criminal charges. The Board noted that Champ failed to mention any other reason for denying reinstatement until the hearing before the ALJ. The Board also found

that none of the employees were guilty of the misconduct described in the criminal charges.

"Striking employees who engage in serious picket line misconduct forfeit the protection of the Act and may be discharged for such conduct." General Teamsters Local No. 162 v. NLRB, 782 F.2d 839, 841 (9th Cir. 1986). Once the General Counsel has made a prima facie showing of violation of the Act by demonstrating that an employee was discharged for conduct occurring during a strike, "[t]he employer may defend the discharge on the ground that it had 'an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature' and that the discharge decision was based on that misconduct." Id. (quoting General Tel. Co. of Mich., 251 NLRB 737, 738 (1980) (emphasis added), enforced, 672 F.2d 894 (D.C. Cir. 1981)). Once an employer makes this showing, "the General Counsel must then

affirmatively show that the employee did not in fact engage in such conduct." General Teamsters, 782 F.2d at 841-42; accord General Tel. Co. of Mich., 251 NLRB at 738-39. If it is found that the employee did not engage in the conduct, he cannot be discharged regardless of the employer's good faith belief. N.L.R.B. v. Burnup and Sims, Inc., 379 U.S. 21, 23 (1964).

Substantial evidence supports the Board's determination that Champ did not act in good faith in refusing to reinstate the strikers. The fact that Champ never mentioned any misconduct other than the pending criminal charges up until the time of the hearing supports the Board's finding that Champ only relied on the pending criminal charges when it discharged the strikers. The Board's decision is also supported by the fact that Champ only refused to reinstate employees with pending criminal charges, and

did not look into misconduct by any other employee.

Substantial evidence supports the Board's decision that none of the conduct underlying the pending criminal charges in fact occurred. The ALJ credited the testimony of Villavicencio, Almaroz, Solis, and Rodriguez that they did not engage in the misconduct that resulted in criminal charges. The ALJ did not believe the testimony of Champ's witnesses concerning these incidents. All of the criminal charges were dropped with the exception of those against Villavicencio, who pleaded nolo contendere to blocking a vehicular crossing. Champ has not shown by a clear preponderance of the evidence that the ALJ's credibility determinations should be rejected. Lippincott Indus., Inc., 661 F.2d at 114. Because the General Counsel has demonstrated that the misconduct in question did not in fact occur, Champ's refusal to

reinstate these employees constitutes an unfair labor practice. See Burnup & Sims, 379 U.S. at 23 (an employer may not discharge an employee for misconduct that did not occur even if the employer had a good faith belief that such misconduct occurred). Because we conclude that the discharge of the employees was based on the existence of criminal charges that were not proved, we need not address the Union's argument that Champ condoned the strikers' misconduct or subjected them to disparate treatment.

VIII

CONCLUSION

The Board's order is supported by substantial evidence and we therefore grant enforcement.

ENFORCEMENT GRANTED.

291 NLRB No. 119

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHAMP CORPORATION

and

Cases 21-CA-18696
21-CA-19007
21-CA-19423
21-CA-19424

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA--UAW;
AND INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA--UAW,
LOCAL 509

DECISION AND ORDER

On February 4, 1982 Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions, a supporting brief, and an answering brief to the Respondent's exceptions, and the Charging Party filed cross-exceptions and a brief in support of

its cross-exceptions and in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings, findings,[7] and conclusions,[8] as

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[7] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Nor do we find any merit to the Respondent's contention that the judge was biased and prejudiced against it. Specifically regarding the Respondent's allegation that the judge improperly foreclosed it from introducing evidence about the nature of the parties' contract negctiations to show that economic considerations, rather than unfair labor practices, were responsible for prolonging the strike, we note that the record shows clearly that the Respondent made an informed choice not to introduce such evidence in order to avoid expanding the scope of the proceeding to include a "surface bargaining" issue. Also, with respect to the Respondent's contention that the judge improperly relied on hearsay evidence in finding that the Respondent violated the Act by failing to reinstate employee Marvin Cummings, we find it unnecessary to address the Respondent's contention because, even without the alleged hearsay testimony, the record contains no evidence that the Respondent ever satisfied its reinstatement obligation with respect to Cummings.

We correct the following inadvertent errors of the judge.

(continued...)

[7](...continued)
First, the judge stated in her decision that employee Francisco Zamora testified that he could not recall a list of employees being mentioned during the negotiation session that took place about October 31, 1979. The record, however, indicates that Zamora did in fact testify that such a list was mentioned during the meeting. Second, in describing the chronology of events surrounding the return to work of employee Jose Padilla, it is clear from the record that the judge incorrectly identified the testimony of Foreman Daniel Krivoshia as being that of Manager Dick Rowe, who did not testify during the hearing. Third, in describing certain occurrences of alleged strike misconduct involving employee Carlos Alamaroz, the judge incorrectly stated that purchasing agent Loren Peaslee, rather than Almaroz, was shopping with his wife and children when the alleged threat was made by Alamaroz. Fourth, the judge stated that a criminal charge against employee Jose Villavicencio was "dropped" on a motion by the district attorney. The record shows that the original charge was amended to another charge and that Villavicencio pleaded nolo contendere to the amended charge and was fined $70.50. The record,
(continued...)

modified below.[9]

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[7](...continued)
however, does not reveal the nature of the amended charge.

[8] The judge made several collateral unfair labor practice conclusions that were not alleged in the complaint and that were not litigated in the hearing. Accordingly, we do not adopt the judge's conclusions that the Respondent independently violated Sec. 8(a)(3) and (1) of the Act by unilaterally changing job classifications and affording new hires superior employment opportunities, by the more rigorous application of disciplinary measures against individuals engaged in protected concerted activity, and by considering misconduct previously condoned in determining reinstatement decisions. No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally granting paid holidays without providing the Union with prior notice and opportunity to bargain and by raising the issue of additional paid holidays prior to discussion of economic issues. Further, although the judge made a finding that the General Counsel abandoned an 8(a)(5) and (1) allegation that the Respondent bargained directly with employees by offering increased benefits, she erroneously entered an 8(a)(5) finding in her conclusions of law. (No exceptions were filed to the judge's abandonment findings.) Finally, we disavow the judge's ambiguous dictum to the effect that "once a matter is raised in negotiations the employer may institute the change."

1. The Respondent contends that it was denied due process by the judge's consideration of testimony concerning a November 5, 1979 union meeting because the Union failed to comply with a January 28, 1981 subpoena duces tecum requesting all writings related to the Union's October and November 1979 meetings. The Respondent further contends that it was prejudiced by the General Counsel's failure to seek enforcement of the subpoena. In this connection, the Respondent asserts that on the Union's failure to comply with the subpoena the General Counsel, under Section 102.31(d) of the Board's Rules and Regulations, was required to seek enforcement

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[9](...continued)

[9] We have modified the judge's recommended Order and notice to provide the affirmative requirement that the Respondent remove from its records any references to the unlawful discharges and other discriminatory conduct. Sterling Sugars, 261 NLRB 472 (1982).

of the subpoena. The Respondent's arguments are misplaced.

As the judge found, the credited testimony establishes no grounds for finding a willful refusal to comply with the subpoena, or a bad-faith effort on the part of the Union in searching for the missing documents. On the contrary, the evidence shows that the subpoenaed documents, through no fault of the Union, were unavailable. Because it has been demonstrated that the subpoena was incapable of being enforced, the Respondent has shown no prejudice arising from the General Counsel's failure to seek its enforcement. Further, because the Union presented (1) credible testimony concerning its good-faith, albeit unsuccessful, search for the notes taken in the union meeting at issue, and (2) evidence concerning circumstances under which it can reasonably be inferred that the notes could have been

inadvertently destroyed or misplaced (i.e., the retirement or replacement of the two individuals responsible for taking or storing the notes), the judge did not err in declining to draw an adverse inference from the Union's failure to produce the notes, i.e., an inference that the notes would have contradicted the testimony of union witnesses concerning what transpired at the November 5 meeting. Accordingly, we find no merit to the Respondent's contentions as to the documents covered by the subpoena duces tecum.

2. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by the October 1979 termination of striking employees Steven Baugh, Jose Naranjo, Heriberto Valenzuela, Joe Solis, Ruben Gutierrez, and Eduarado Ortiz. As found by the judge, concerning each of these individuals the Respondent informed either

the discharges himself or his union representative that his employment was effectively terminated. Regarding Baugh and Naranjo, the credited evidence reveals that on October 17, 1979, General Manager Tom Simovich informed these individuals at a picket line that they were "fired," that they "don't work here anymore" and directed them to "go home" and threatened their arrest. We agree with the judge that Simovich's comments would reasonably lead an employee to believe that he had been discharged. Trident Recycling Co., 282 NLRB No. 170 (Feb. 17, 1987). We note that Simovich's remarks were entirely unequivocal in character, were phrased as an immediate discharge, were accompanied by a direction to leave the employment site with a concurrent threat of arrest, and were uttered by a high management official so as to lend credence to the finality of the action taken.

Concerning Valenzuela, Solis, Gutierrez, and Ortiz, the credited evidence establishes that in late October 1979 the Respondent's negotiator and labor consultant, Edmund J. Hoy, presented a list of these employees to the Union's business representative, Ralph Gazzigli. The list also included the name of employee Steven Baugh. Hoy informed Gazzigli that these five individuals "would never be rehired, or reinstated under any conditions [or] circumstances" by the Respondent because they were suspected to be involved in strike violence. Several days later, Hoy attempted to present the list to Gazzigli at a negotiation session in the presence of several employee-members of the Union's negotiating committee, including Steven Baugh. On this occasion, Hoy indicated at the outset that contract issues were now secondary to the property damage and vandalism that the Respondent was

experiencing during the strike and that it did not want to continue negotiations in an atmosphere of violence. Hoy then announced that he had a list of individuals that the Respondent "would not take back under any conditions." Hoy indicated unequivocally that "regardless if we come to a contract, to an agreement, or whatever, the strike ends, we will not take these individuals back." At the urging of Gazzigli and the intervention of a Federal mediator, the list was not formally presented on this occasion, although the mediator informed Gazzigli that the Respondent was "adamant" about the matter. Employee Baugh testified that he saw the names on the list at this meeting.

In agreement with the judge, we find that the Respondent effectively terminated the employment of the individuals on this list. Hoy's characterization of the employment tenure of the employees on the

list was clear and unambiguous: they would "never" resume their employment "under any conditions." We reject the notion that Hoy's remarks were simply a bargaining posture that would not necessarily lead employees on the list, or their union representative, to believe that the employees actually had been terminated. We note that Hoy expressly stated that regardless of the cessation of the strike or any contract agreement that might be reached, these individuals would not resume their employment, thereby removing the employment status of these individuals as a negotiable matter and effectively implementing their discharges.[10]

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[10] We find merit in the General Counsel's limited exception with respect to the commencement date of employee Heriberto Valenzuela's backpay. As pointed out by the General Counsel, the judge found that the Respondent, on October 25, 1979, violated Sec. 8(a)(3) and (1) of the Act by discharging Valenzuela and four other employees. However, unlike the backpay date set for the

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[10](...continued)
other employees discriminated against on October 25, 1979, the judge found that Valenzuela's backpay was to commence on April 17, 1980. In light of this unexplained inconsistency and the record as a whole, we are convinced that the judge inadvertently excluded Valenzuela from the group of employees whose backpay was to commence on October 25, 1979. We have, accordingly, modified the Order so that Valenzuela's backpay commences as of October 25, 1979.

In adopting the judge's finding that the strike was converted to an unfair labor practice strike on November 5, 1979, when unit employees met to discuss the strike, we note that the October 1979 termination of employees Baugh and Naranjo by Tom Simovich was presented to the membership for consideration as well as the list of employees tendered to Hoy to Gazzigli.

Respondent argues that its written request that all employees return to work by November 2, 1979, somehow negates the effect of its discharge of Baugh and Naranjo. We find that the form letter sent to employees is insufficient to cure the discharges specifically communicated to employees Baugh and Naranjo. The fact that the Respondent sent a form letter does not alter the finding that the message communicated to Baugh and Naranjo by Tom Simovich was that they were no longer employed. Accordingly, we find that the termination of each of these six employees served to convert the strike to an unfair labor practice strike.

(continued...)

3. The complaint alleged that about June 10, 1980, the Respondent discharged a group of 10 employees in violation of Section 8(a)(3) and (1) and that, since that date, the Respondent has failed and refused to

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[10](...continued)
Member Cracraft would not find that the Respondent's actions during strike settlement discussions and contract negotiations of twice tendering a list of employees whom the Respondent desired to have disqualified from reinstatement violated Sec. 8(a)(3) and (1). However, she agrees with her colleagues' finding that the economic strike was converted to an unfair labor practice strike on November 5, 1979, when employees voted to continue the strike based in part on the unlawful discharge of employees Baugh and Naranjo.

In determining the backpay commencement date for certain unfair labor practice strikers included in the Union's unconditional offer to return to work, dated April 17, 1980, the judge incorrectly determined the date to be April 17, 1980, rather than April 21, 1980, the effective date of the unconditional offer as stated in the offer itself. Therefore, we have modified the backpay commencement dates for the employees whose dates were listed as April 17, 1980, in the recommended Order to be April 21, 1980.

reinstate these employees.[11] At the hearing, the General Counsel expressly conceded that these employees were economic strikers who had been replaced by the Respondent before the strike was converted to an unfair labor practice strike on November 5, 1979. Thus, according to the General Counsel's representation at the hearing, these employees were replaced by economic strikers until their termination on June 10, 1980, when the Respondent remitted accrued vacation and profit-sharing benefits to eligible employees in this category. At that point, according to the General Counsel, these employees occupied the status of discharged economic strikers, i.e., as of June 10, 1980.

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[11] This group is comprised of Antonio Andrade, Javier Arroyo, Alejandro Arroyo, David Coronado, Rick Craft, Enrique Figueroa, Lorenzo Franco, Micky Lambright, Francisco Zamora, and Martiniano Rodriguez.

Notwithstanding the failure to the General Counsel to contest the status of this group of employees as replaced economic strikers prior to their discharges, the judge found that these employees had not been permanently replaced prior to the conversion of the strike to an unfair labor practice strike and were entitled to reinstatement and backpay as of April 17, 1980, the date of the unconditional offer to return to work. In view of the scope of the complaint and the representations of the General Counsel, we find that the judge erred in placing the burden on the Respondent, concerning this category of employees, to establish a basis for treating these employees as replaced economic strikers. Rather, we find in agreement with the judge's alternative analysis of this issue that, regarding this group, the unfair labor practice occurred, as

alleged in the complaint, on June 10, 1980,[12] when this group of employees was effectively terminated for discriminatory reasons without any economic justification. In the absence of a complaint allegation that the Respondent unlawfully failed to reinstate these employees in April 1980 on the cessation of the strike, and in light of the theory of the complaint as explained by the General Counsel at the hearing, we find that the Respondent was not put on notice that any reinstatement issues based on events prior to the June 10, 1980 terminations were to be litigated a to this group. Accordingly, we will leave to the compliance stage consideration of the reinstatement and backpay rights of these employees in light of their unlawful termination in June 1980.

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[12] Francisco Zamora, a member of this group, was discharged on March 7, 1980.

4. The complaint also alleged that about May 30, 1980, the Respondent limited the reinstatement rights of a group of four laid-off employees to the duration of their employment tenure with the Respondent, in violation of Section 8(a)(3) and (1).[13] At the hearing, the General Counsel expressly indicated that the layoff status of these employees was not unlawful and not at issue, and that the complaint allegation was directed to the Respondent's limitation of reinstatement rights, following their layoff. In remedying this violation, however, the judge found that the Respondent was required to offer immediate reinstatement and backpay to these employees as of April 1980, when an unconditional offer to return to work was tendered and that backpay continued to accrue

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[13] The employees in this group are Gonzalo Andrade, Manuel Goray, Javier Lopez, and Jose Reyes.

notwithstanding the layoff status of these employees. Thus, the judge found that the Respondent had failed entirely to establish an economic defense to support its actions toward this group. By ordering immediate reinstatement and backpay, the judge essentially found that the layoff of these employees was impermissible. This finding is in direct contrast to both the representations of the General Counsel at the hearing and to the limited scope of the complaint, which is directed solely to the placement of impermissible conditions on the employees' reinstatement rights. In these circumstances, we find that the Respondent was not put on notice that the lawfulness of the layoff status of these employees was to be litigated. Although we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by placing impermissible restrictions on the reinstatement rights or

these employees, we find that the appropriate remedy is to order the Respondent to cease and desist from the placement of such restrictions. We will leave to the compliance stage of these proceedings resolution of any issues concerning whether the unfair labor practice--the limitation of reinstatement rights--had a bearing on the actual reinstatement of these employees and, if so, whether there was any resulting loss of pay after May 30, 1980.[14]

5. The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate 11 striking employees who allegedly engaged in strike misconduct. The Respondent expressly challenges the judge's findings on the misconduct issues with

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[14] We note that these four laid-off employees are additionally entitled to be made whole for the period April 21 to May 30, 1980, when they were unreinstated unfair labor practice strikers who had unconditionally offered to return to work.

respect to strikers Jose Villavicencio, Carlos Almaroz, Joe Solis, and Ramon Rodriguez. It is less clear whether it is raising such a challenge about the other seven, because it presents no arguments in its brief with respect to the lawfulness of its decision to deny them reinstatement on misconduct grounds.[15] In any event, for the

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[15] These other seven employees are Alberto Cortez, Ernesto Arroyo, Cesar Moran, Javier Olague, Jose Padilla, Martiniano Rodriguez, and Heriberto Valenzuela.

We find merit in the Respondent's contention that backpay otherwise owing to employee Alberto Cortez was tolled by the Respondent's valid attempt to communicate to Cortez an offer to return to work by telegram of November 12, 1980, sent to Cortez' last known address. Bodolay Packaging Machinery, 271 NLRB 10, 11 (1984). The tolling of backpay, however, does not relieve the Respondent of its reinstatement obligation toward Cortez. Burnup & Sims, 256 NLRB 965, 966 (1981).

We find no merit in the Respondent's contention that any backpay owing to Cesar Moran ended when, by letter of September 26, 1980, Moran purportedly was offered reinstatement. The record shows that on

(continued...)

following reasons we agree with the judge that the Respondent unlawfully failed to reinstate those 11 employees.

In order to establish a lawful basis for denying reinstatement to an employee for engaging in strike misconduct, an employer must initially show that it entertained a good-faith belief that the striker actually engaged in misconduct serious enough to warrant denying reinstatement. If such a showing is made, the burden then shifts to the General Counsel to demonstrate that the alleged misconduct did not in fact occur. If the employer fails to make the initial showing or if the General Counsel carries her burden of showing that the alleged misconduct

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[15](...continued)
that date the Respondent notified Moran, an unfair labor practice striker, that he had been laid off and would be reinstated only when a job opening occurred. Because the letter did not constitute a proper offer of present reinstatement, we find it insufficient to toll backpay.

did not in fact occur, the General Counsel prevails. If the employer makes the initial showing and the General Counsel does not carry her burden of showing no actual misconduct, then the employer prevails, and the denial of reinstatement will be found lawful. General Telephone Co., 251 NLRB 737, 739 (1980), enfd. mem. 673 F.2d 551 (D.C. Cir. 1982). See generally NLRB v. Burnup & Sims, 379 U.S. 21, 23 (1964).

Even in cases in which a striker has actually engaged in misconduct and the employer denies reinstatement on the grounds of that misconduct, an employer may still violate Section 8(a)(3) and (1) of the Act if that denial represents disparate treatment of strikers as compared with nonstrikers or replacements, i.e., if it is denying reinstatement to strikers for conduct that is substantially the same as conduct that it has tolerated on the part of employees who have

refrained from striking. Garrett Railroad Car v. NLRB, 683 F.2d 731, 740 (3d Cir. 1982) (applying the principle but upholding the refusal to reinstate because employer lacked knowledge of nonstriker involvement in misconduct); Aztec Bus, 289 NLRB No. 125 (July 22, 1988).

Like the judge, we apply the foregoing tests only to those grounds for denying reinstatement that the Respondent actually purported to rely on when it denied reinstatement to strikers after their unconditional offers to return. Following the tender of those offers, the Respondent, through Manager Ed Simovich, met individually on May 30, 1980, with each employee accused of strike misconduct. At this time, the Respondent informed those employees that they were ineligible for reinstatement until certain pending criminal charges were resolved. Based on repeated statements and

correspondence to employees to this effect, and on the failure ever to inform these employees that other matters were a basis for denial of reinstatement,[16] the judge found, and we agree, that the only asserted basis for the denial of reinstatement was conduct that was the subject of those pending charges.[17]

First, concerning employees Villavicencio, Almaroz, Solis, and Ramon Rodriguez, the judge credited their testimony

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[16] The judge expressly discredited Ed Simovich's assertions that the Respondent took into consideration other matters allegedly occurring during the strike that were not the subject of criminal charges and that he intended to investigate such complaints further.

[17] Further, we agree with the judge that the Respondent did not rely on any asserted misconduct occurring prior to October 30, 1979, because on that date it offered to all striking employees, including the employees alleged to have engaged in misconduct, the opportunity to return to work.

that they did not engage in the acts of misconduct that were the subject of criminal charges pending when the Respondent denied them reinstatement. We find no basis to disturb those findings.[18]

With respect to those four and the other seven--whose arrests were related to an

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[18] The judge credited Villavicencio's denial of accusations that he threw rocks or stones or engaged in other misconduct. The judge also credited Almaroz' denial that he threw rocks at vehicles or engaged in other misconduct. Regarding Ramon Rodriguez, the judge credited Rodriguez' denial that he kicked the side of a car or purposely beat on cars or threatened another individual. Concerning Joe Solis, the judge found that Solis did not make racial slurs or threaten another employee and noted that a criminal charge involving an alleged threat to blow up a vehicle, which Solis denied, was dismissed. The judge also found that the Respondent did not rely on Solis' alleged threat to kill Tom Simovich in denying reinstatement as this was not the subject of a criminal charge and it preceded the October 30, 1979 reinstatement offer to employees. Moreover, with regard to this alleged threat to Simovich, as noted infra, the Respondent expressed no concern when striking employees were threatened similarly by nonstriking employees.

alleged blocking of a thoroughfare--we uphold the judge's ultimate findings on the additional ground that these denials of reinstatement constituted disparate treatment when compared with the Respondent's actions towards nonstrikers and replacements. Thus, for example, the Respondent was aware that nonstriking employee Freddie Vallejos had physically assaulted striker Ramon Rodriguez. It was also aware that Vallejos had been arrested in connection with another strike-related incident in which he was accused of swinging an ax. (Vallejos pleaded guilty to a lesser offense in connection with the latter incident.) The Respondent took no disciplinary action at all against Vallejos.

Further, after the conclusion of the strike, the Respondent failed to make any significant investigation into repeated incidents of threats and violence against former strikers Padilla, Valenzuela, Elpidio

Cortez, Elizarraras, Vargas, and Salvador Garcia that were brought to its attention. Padilla filed a police report following an incident when he was punched in the stomach by nonstriker N. Lopez, who then threatened to kill Padilla. Padilla was also assaulted by nonstriker Nieblas during this incident. When the incident was brought to the attention of management, Manager Ed Simovich merely shrugged and informed Padilla he could not do anything. Similarly, Ed Simovich took no action when informed by former striker Valenzuela that nonstriker Corona had threatened to kill him and did nothing following another incident when Valenzuela was surrounded and physically menaced by employees.

Notwithstanding its knowledge of these acts of misconduct directed against strikers by nonstrikers, the Respondent took no action against the perpetrators. In contrast, the

Respondent failed to reinstate strikers accused of comparable or lesser misconduct in a timely manner. This discriminatory and disparate treatment establishes that the Respondent lacked good faith and acted discriminatorily in denying reinstatement to the 11 employees at issue because of alleged strike misconduct. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by failing to offer timely reinstatement to the 11 employees in this category.[19]

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[19] The judge's decision issued prior to the Board's decision in Clear Pine Moldings, 268 NLRB 1044 (1984). In that case the Board adopted the objective standard for assessing alleged strike misconduct of whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Further, in Gem Urethane Corp., 284 NLRB No. 122 (July 20, 1987), the Board reiterated the principle that if an employer establishes a honest belief that an employee seeking reinstatement has engaged in misconduct, the General Counsel must come forward with

(continued...)

Conclusions of law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of

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[19](...continued)
evidence that either the employee did not engage in the alleged misconduct or that the conduct was not sufficiently serious to preclude reinstatement. Thus, "at all times, the burden of proving discrimination is that of the General Counsel.'' Id., slip op. at 11--12. Here, the Respondent's denial of reinstatement based on alleged strike misconduct was not undertaken in good faith and on a nondiscriminatory basis. Further, as noted, the evidence, pursuant to the judge's credibility resolutions, shows that some of the employees at issue did not engage in the disqualifying misconduct that purportedly formed the basis for the Respondent's denial of reinstatement. In this regard, we find it unnecessary to consider, and do not adopt, the judge's ''arguendo'' discussion about employee Ramon Rodriguez and do not rely on all the cases cited by the judge, including Coronet Casuals, 207 NLRB 304 (1973), and the Board's decision in W. C. McQuaide, Inc., 220 NLRB 593 (1975), enfd. denied 552 F.2d 519 (1977).

America--UAW (International Union or Union); and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America--UAW, Local 509 (Local Union), are labor organizations within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

> All production and maintenance employees, including shipping and receiving employees, lead persons, service employees, inspectors and truck drivers employed by Respondent at its facilities located at 2439 North Rosemead Boulevard, 2500 North Rosemead Boulevard and 2423 Troy Street, South El Monte, California; excluding all office clerical employees, professional

employees, guards, and supervisors as defined in the Act.

4. At all times since December 14, 1978, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

5. The work stoppage, which began on October 15, was prolonged by the Respondent's unfair labor practices as of November 5, 1980.

6. By threatening to have striking employees fired and/or arrested while they were peacefully picketing, the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and engaged in unfair labor Practices in violation of Section 8(a)(1) of the Act.

7. By offering, on November 2, 1979, Manuel Avalos and Ernesto Franco increased benefits if they abandoned the strike and

returned to work in order to induce employees to withdraw their support for the Union and the strike, the Respondent has interfered with its employees' Section 7 rights and has violated Section 8(a)(1) of the Act.

8. By threatening employees on the picket line with vehicular assault, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

9. By discharging Steven Baugh and Jose Naranjo on October 17, 1979; Baugh, Joe Solis, Eduardo Ortiz, Heriberto Valenzuela, and Ruben Gutierrez on October 25, 1979; and Francisco Zamora on March 7, 1980, because of their membership in or activities on behalf of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

10. By unilaterally granting to its employees the benefit of additional paid holidays without notifying or consulting with

the Union in good faith, the Respondent violated Section 8(a)(5) and (1) of the Act.

11. By withdrawing recognition from the Union and thereafter failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the aforesaid unit until a decertification petition has been processed, the Respondent has violated Section 8(a)(5) and (1) of the Act.

12. By refusing to bargain collectively with the Union, by refusing to furnish or unduly delaying the furnishing of certain information, which is relevant to the Union's performance of its representation responsibilities on behalf of unit employees, the Respondent has violated Section 8(a)(5) and (1) of the Act.

13. By failing and refusing since April 21, 1980, to make timely offers of reinstatement to the following unfair labor

practice strikers: Steven J. Baugh, Jose G. Naranjo, John Gresko, Henry Carrilo, Filiberto Ruiz, Tomas Vargas, Manuel Cruz, Nicholas Diaz, Ernesto Franco, Pedro Pena, Salvador Hernandez, Erasmo Salazar, Rene Gallardo, Salvado Garcia, Octaviano Arellano, Javier Olague, Ernesto Cortez, Pedro Garcia, Jesus Valdez, Salvador Elizarraras, Ernesto Lopez, Wallace Kerr, Alejandro Lopez, Jose Pedroza, Raymond Wise, Gonzalo Andrade, Manuel Garay, Javier Lopez and Jose Reyes because they engaged in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

14. By failing and refusing since May 9, 1980, to make timely offers of reinstatement to Vincent Inez Gonzales Banaga, Raul Cortez, Marvin Cummings, Oscar Guerrero, Calvin Hassler, David Hassler, Ronald Kerr, and Manuel Avalos, because they engaged in protected concerted activity, the

Respondent violated Section 8(a)(3) and (1) of the Act.

15. By limiting the duration of the reinstatement rights of Gonzalo Andrade, Manuel Garay, Javier Lopez, and Jose Reyes to the length of their tenure with Respondent because they engaged in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

16. By discharging about June 10, 1980, Antonio Andrade, Alejandro Arroyo, Javier Arroyo, David Coronado, Ricky Craft, Enrique Figueroa, Lorenzo Franco, Mickey Lambright, Martiniano Rodriguez, and Francisco Zamora, and failing and refusing to reinstate these employees because they engaged in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

17. By unlawfully requiring Jesus Valdez about August 6, 1980, to execute an

application and take a physical examination as a new employee as a condition to reinstatement and accept employment as a new employee, the Respondent violated Section 8(a)(3) and (1) of the Act.

18. By failing to give Elpidio Cortez and Armando Escandon a reasonable amount of time to respond to the offer of recall, the Respondent violated Section 8(a)(3) and (1) of the Act.

19. By unlawfully failing and refusing to offer timely reinstatement to Carlos Almaroz, Ernesto Arroyo, Alberto Cortez, Cesar Moran, Javier Olague, Jose Padilla, Ramon Rodriguez, Martiniano Rodriguez, Joe Solis, Heriberto Valenzuela, Jose Villavicencio, and other strikers named herein, and by discharging on October 31, 1980, Jose Villavicencio, Carlos Almaroz, and Ramon Rodriguez, the Respondent has violated Section 8(a)(3) and (1) of the Act.

20. By placing impermissible preconditions for reinstatement on the striking employees including the acceptance of new employee status, the Respondent violated Section 8(a)(3) and (1) of the Act.

21. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

In view of long duration of the strike, commencing on October 15, 1979, and ending April 7, 1980, the extremely long period since the end of the strike, and the numerous unfair labor practices of Champ Corporation that prolonged the strike, certain special

remedies are necessary to restore, insofar as practicable, the status quo ante. In all probability, many of the strikers have since taken employment with other employers and many out of necessity moved to other locations. They should be accorded full and equitable opportunity to consider present offers of reinstatement, free of any fears of the recurrence of the unfair labor practices against them.

The Respondent, therefore, shall, in addition to the usual posting, prepare a Spanish translation of the official English-language notice, since the record reveals that a substantial number of the Respondent's employees speak Spanish; both English and Spanish versions shall be simultaneously posted on all plant bulletin boards[20] and copies of both versions mailed

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[20] Hasa Chemical, 235 NLRB 903 (1978).

to each employee currently employed and to each employee named in Schedules 1 through V appended hereto. All diligent efforts shall be employed by the Respondent to assure that such communication reaches the addressees, including the acceptance of assistance by the Union, if offered. The Respondent shall provide the Regional Director for Region 21 with proof of such mailing.

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, it is ordered that the Respondent be required to provide the International Union, in writing, with: (1) A description of the job duties performed by all unit employees for the preceding 12 months and (2) the dates of layoff of all unit employees who had been laid off during the preceding 12 months. In addition, the Respondent shall meet and participate in negotiation sessions and cease

refusing to do so based on the decertification petition found herein not to raise a valid question of the representative status of the International Union. It is also ordered that the Respondent ceases unilaterally changing the existing terms and conditions of employment by paying nonstriking employees for days its facilities are shut down, without prior notification and bargaining with the International Union.

We shall also order reinstatement of the unfair labor practice strikers, with the exceptions noted hereinabove, and in the order and appended schedules, on their unconditional offer to return to work and the dismissal of persons hired on or after November 5, 1979, if that becomes necessary. NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 520--529 (3d Cir. 1977); Newport News Shipbuilding Co., 236 NLRB 1637 (1968), enfd. 602 F.2d 73 (4th Cir. 1979). Reinstatement

shall mean reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges previously enjoyed. Backpay shall be computed for those employees found eligible for reinstatement by calculating for each of them a sum equal to their individual wages as of the date of their unconditional offer to return to work up to the date of the Respondent's offer of reinstatement, less any net earnings during such period, with interest thereon to be computed in the manner prescribed in New Horizons for the Retarded.[21]

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[21] 283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with Florida Steel Corp., 231 NLRB 651 (1977).

It is also ordered that those employees found to have been discriminatorily discharged while engaged in a lawful strike will be entitled to backpay from the date of discharge until the date offered reinstatement. Abilities & Goodwill, Inc., 241 NLRB 27 (1979).

The Respondent will also be required to comply with the Order and to post appropriate notices.

ORDER

The National Labor Relations Board orders that the Respondent, Champ Corporation, South El Monte, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with replacement, termination, discharge, or other reprisal for engaging in a protected strike or other concerted activities, or coercing or

soliciting employees to abandon such activities.

(b) Threatening to have striking employees arrested.

(c) Threatening employees on the picket line with vehicular assault.

(d) Promising employees increased benefits if they abandon the strike and the Union and return to work.

(e) Discharging striking employees, refusing to reinstate, or offering to grant reemployment only as new employees because they have engaged in a protected strike or other concerted activities for their mutual aid or protection.

(f) Unilaterally implementing contract proposals affecting changes in wages and other terms and conditions of employment of employees represented by the Union.

(g) Withholding recognition from the International Union and thereafter failing

and refusing to recognize the International Union as the exclusive collective-bargaining representative of the employees in the described unit.

(h) Failing to give or unnecessarily delaying in giving the Union, on request, information relevant for the Union's representational duties as the exclusive bargaining representative of the employees in the described unit.

(i) Unduly delaying or discriminatorily failing and refusing to reinstate striking employees because they engaged in protected concerted activity.

(j) Limiting the duration of the reinstatement rights of employees because they engaged in protected concerted activities.

(k) In any other manner discouraging membership in the Union or any other labor organization by discrimination with regard to

hire or tenure of employment or any term or condition of employment.

(l) Refusing to bargain collectively with the International Union by unilaterally granting employees additional paid days off without notifying or consulting with the Union in good faith.

(m) Withdrawing recognition from the International Union and thereafter failing and refusing to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit until a decertification petition had been processed.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer each of the unfair labor practice strikers that Respondent classified as permanently replaced, who later were terminated as listed in the attached Schedule I, immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees for any loss of earnings, in the manner set forth in remedy section of this decision.

(b) Offer Ronald Kerr and Marvin Cummings immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole all employees who did not personally appear on April 21, 1980, for any loss of earnings, as detailed in the attached Schedule II, except where noted therein as having no such entitlement, in the manner set forth in the remedy section of this decision.

(c) Offer each of the unfair labor practice strikers classified by Respondent as being on layoff, as listed in the attached Schedule III, immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees for any loss of earnings, in the manner set forth in the remedy section of this decision, in the event that it is determined at compliance that they were not reinstated because of the Respondent's impermissible limitation of their recall rights.

(d) Make whole each of the unfair labor practice strikers, as listed individually in the attached Schedule IV, for any loss of earnings occasioned by Respondent's failure to reinstate these employees in a timely fashion, in the manner set forth in the remedy section of this decision.

(e) Offer Jose Villavicencio, Carlos Almaroz, Alberto Cortez, Cesar Moran, and Ramon Rodriguez immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees as appear on the attached Schedule IV for any loss of earnings, in the manner set forth in the remedy section of this decision.

(f) Offer employees found eligible for reinstatement recall in a manner that affords them a reasonable amount of time to respond.

(g) Furnish the Union a description of the job duties performed by all unit employees for the preceding 12-month period and the date of the lay off of all unit employees that have been laid off during the preceding 12-month period.

(h) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done

and that the discharges will not be used against them in any way.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its plant in South El Monte, California, copies of the attached notice marked "Appendix,"[22] and simultaneously post a notice containing a Spanish-language version of the original notice. Copies of the notice, on forms

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[22] If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Mail a copy of the above-described notices to each currently working employee and to each unfair labor practice striker listed in Schedules I through V in the manner set forth in the remedy section of this decision.

(l) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated, Washington, D.C. November 25, 1988

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins, Jr. Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with replacement, termination, discharge, or other reprisal for engaging in a protected strike or other concerted activities, or coerce or solicit you to abandon such activities.

WE WILL NOT threaten to have striking employees arrested.

WE WILL NOT threaten you on the picket line with vehicular assault.

WE WILL NOT promise you increased benefits if you abandon the strike and the Union and return to work.

WE WILL NOT discharge you, refuse to reinstate, or offer to grant you reemployment only as a new employee because you have engaged in a protected strike or other concerted activities for your mutual aid or protection.

WE WILL NOT unilaterally implement contract proposals affecting changes in wages and other terms and conditions of employment of employees represented by the Union.

WE WILL NOT withhold recognition from the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America--UAW; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America--UAW, Local 509, and thereafter fail and refuse to recognize the International Union as the exclusive collective-bargaining representative of the employees in the described unit.

WE WILL NOT fail to give or unnecessarily delay in giving the Union, on request, information relevant for the Union's representational duties as the exclusive bargaining representative of the employees in the described unit.

WE WILL NOT unduly delay or discriminatorily fail and refuse to reinstate you because you engaged in protected concerted activity.

WE WILL NOT limit the duration of your reinstatement rights because you engaged in protected concerted activities.

WE WILL NOT in any other manner discourage membership in the Union or any other labor organization by discrimination with regard to

hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to bargain collectively with the International Union by unilaterally granting employees additional paid days off without notifying or consulting with the Union in good faith.

WE WILL NOT withdraw recognition from the International Union and thereafter fail and refuse to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit until a decertification petition has been processed.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer each of you that we classified as permanently replaced, who later were terminated as listed in the attached Schedule I, immediate reinstatement to your former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make you whole for any loss of earnings, plus interest.

WE WILL offer Ronald Kerr and Marvin Cummings immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole all employees who did not personally appear on April 21, 1980, for any loss of earnings, as detailed in the attached Schedule II, except where noted therein as having no such entitlement, plus interest.

WE WILL offer each of you classified by us as being on layoff, as listed in the attached Schedule III, immediate reinstatement to your former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make you whole for any loss of earnings, plus interest, in the event that it is determined at compliance that you were not reinstated because of our impermissible limitation of your recall rights.

WE WILL make whole each of you, as listed individually in the attached Schedule IV, for any loss of earnings occasioned by our failure to reinstate you in a timely fashion, plus interest.

WE WILL offer Jose Villavicencio, Carlos Almaroz, Alberto Cortez, Cesar Moran, and Ramon Rodriguez immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make them whole, as appear on the attached Schedule IV, for any loss of earnings, plus interest.

WE WILL notify each of them, that we have removed from our files any reference to their discharge and that the discharge will not be used against them in any way.

WE WILL, on request, recognize and bargain with the International Union as the exclusive collective-bargaining representative of our employees in the following described appropriate unit with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement. The appropriate unit includes:

All production and maintenance employees, including shipping and receiving employees, lead persons, service employees, inspectors and truckdrivers employed by Respondent at its facilities located at 2439 North Rosemead Boulevard 2500 North Rosemead Boulevard, and 2423 Troy Street, South El Monte, California; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer those of you found eligible for reinstatement recall in a manner that affords you a reasonable amount of time to respond.

WE WILL furnish the Union a description of the job duties performed by all unit employees for the preceding 12-month period and the date of layoff of all unit employees that had been laid off during the preceding 12-month period.

SCHEDULE I

Employees Permanently Replaced Who Were Terminated

	Backpay Periods, if any
Antonio Andrade	June 10, 1980 to present, as further determined at compliance
Alejandro Arroyo	June 10, 1980 to present, as further determined at compliance
Javier Arroyo	June 10, 1980 to present, as further determined at compliance

David Coronado	June 10, 1980 to present, as further determined at compliance
Ricky Craft	June 10, 1980 to present, as further determined at compliance
Enrique Figueroa	June 10, 1980 to present, as further determined at compliance
Lorenzo Franco	June 10, 1980 to present, as further determined at compliance
Mickey Lambright	June 10, 1980 to present, as further determined at compliance
Martiniano Rodriguez	June 10, 1980 to present, as further determined at compliance
Francisco Zamora	March 7, 1980 to present, as further determined at compliance

SCHEDULE II

Employees Who Did Not Personally Appear on April 21

	Backpay Periods, if any
Vincent Inez Banaga	May 9 to July 18, 1980
Raul Cortez	May 9 to July 10, 1980
Oscar Guerrero	May 9 to July 10, 1980
Calvin Hassler	May 9 to July 10, 1980
David Hassler	May 9 to July 10, 1980

Dexter Kerr	No entitlement to reinstatement or backpay
Ronald Kerr	May 9 to present, entitled to reinstatement
Randolph Montoya	No entitlement to reinstatement or backpay
Manuel Avalos	May 9 to July 11, 1980
Marvin Cummings	May 9 to present, entitled to reinstatement

SCHEDULE III

Employees on Layoff

	Backpay Periods, if any
Gonzalo Andrade	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance
Manuel Garay	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance
Javier Lopez	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance

Jose Reyes	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance

SCHEDULE IV

Employees Whose Reinstatement Was Delayed

	Backpay periods, if any
John Gresko	April 21 to May 9, 1980
Henry Carrillo	April 21 to May 9, 1980
Filiberto Ruiz	April 21 to May 9, 1980
Tomas Vargas	April 21 to May 15, 1980
Jose Naranjo	October 17, 1979 to May 5, 1980
Steven Baugh	October 17, 1979 to May 16, 1980
Manuel Cruz	April 21 to May 19, 1980
Nicholas Diaz	April 21 to May 19, 1980
Armando Escando	April 21 to July 31, 1980
Elpidio Cortez	April 21 to June 17, 1980
Ernesto Franco	April 21 to May 21, 1980
Pedro Pena	April 21 to May 22, 1980
Salvador Fernandez	April 21 to May 22, 1980
Erasmo Salazar	April 21 to May 22, 1980
Rene Gallardo	April 21 to May 23, 1980
Salvador Garcia	April 21 to May 23, 1980
Octaviano Arellano	April 21 to May 23, 1980
Ernesto Cortez	April 21 to May 27, 1980
Salvador Elizarraras	April 21 to May 27, 1980
Ernesto Lopez	April 21 to May 27, 1980
Wallace Kerr	April 21 to May 29, 1980
Pedro Garcia	April 21 to May 29, 1980
Alejandro Lopez	April 21 to May 29, 1980
Pedro Lopez	To be determined during backpay proceedings

Jose Pednoza	April 21 to May 30, 1980
Raymond Wise	April 21 to May 30, 1980
Jesus Valdez	April 21 to September 10, 1980

SCHEDULE V

Employees Charged

	Backpay Periods, if any
Ruben Gutierrez	From October 25, 1979 to date of disqualifying behavior, to be determined during the compliance phase of this proceeding
Eduardo Ortiz	From October 25, 1979 to date of disqualifying behavior, to be determined during the compliance phase of this proceeding
Joe Solis	October 25, 1979 to present
Jose Villavicencio	April 21 to present
Carlos Almaroz	April 21 to present
Alberto Cortez	April 21 to November 12, 1980
Ernesto Arroyo	April 21 to January 31, 1981
Cesar Moran	April 21 to present
Javier Olague	April 21 to October 30, 1980
Jose Padilla	April 21 to September 29, 1980
Ramon Rodriguez	April 21 to present
Martiniano Rodriguez	(See Schedule I)

Heriberto
Valenzuela

October 25, 1979 to
October 9, 1980

CHAMP CORPORATION

(Employer)

Dated _____By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 South Flower Street, 11th Floor, Los Angeles, California 90017-2803, Telephone 213-894--5229.